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VOL. 57—BANCOR. N. Y.
SUPREME COURT REPORTS.

31

REPORTS
OF
Cases in Law and Equity
DETERMINED IN THE
S U P R E M E C O U R T
OF THE
STATE OF NEW YORK.

BY OLIVER L. BARBOUR, LL. D.

VOL. LVII.

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JUSTICES OF THE SUPREME COURT,

DURING THE YEAR 1870.

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 " 2. DANIEL P. INGRAHAM.†
 " 3. ALBERT CARDOZO.
 " 4. GEORGE G. BARNARD.
 " 5. JOHN R. BRADY.‡

Second Judicial District.

- " 1. JOSEPH F. BARNARD.†
 " 2. JASPER W. GILBERT.
 " 3. ABRAHAM B. TAPPEN.
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Third Judicial District.

- " 1. CHARLES R. INGALLS.*
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 " 3. WILLIAM L. LEARNED.‡
 " 4. THEODORE MILLER.§

Fourth Judicial District.

- " 1. ENOCH H. ROSEKRANS.†
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- " 1. E. DARWIN SMITH.*
 " 2. THOMAS A. JOHNSON.†
 " 3. JAMES C. SMITH.
 " 4. CHARLES C. DWIGHT.§

Eighth Judicial District.

- " 1. RICHARD P. MARVIN.†
 " 2. GEORGE BARKER.
 " 3. JOHN L. TALCOTT.‡
 " 4. CHARLES DANIELS.§

MARSHALL B. CHAMPLAIN, *Attorney General.*

* Sitting in the Court of Appeals until July 4, 1870.

† Presiding Justice until May 1, 1870.

‡ Elected November, 1869.

§ Re-elected November, 1869.

! Appointed by the Governor, June 1870, to fill the place of Judge Peckham, elected to the Court of Appeals.

MEMORANDUM.

For the purpose of carrying into effect the provisions of article 6, section 7, of the Constitution of 1867-8, (the only article of said Constitution which was adopted by the people,) the legislature, by an act passed on the 27th of April, 1870, abrogated the general terms of the Supreme Court, as organized under then existing laws, from and after the 1st day of May then next, and directed that thereafter, all causes and matters then pending in such general terms, or which, by law might be brought before them, should be cognizable before the general terms organized under that act.

By section 2, the State was divided into four departments :

The *First* Department to consist of the 1st Judicial District.

The *Second* Department, of the 2d Judicial District.

The *Third* Department, of the 3d, 4th and 6th Judicial Districts.

The *Fourth* Department, of the 5th, 7th and 8th Judicial Districts.

The statute specifies the times and places at which general terms shall be held, in the several departments.

Section 8 requires the Governor to designate from the whole bench of justices of the Supreme Court, a presiding justice, and two associate justices, for each of said departments, to compose the general term therein ; the person designated as presiding justice, to act as such during his official term ; and each person designated as associate justice, to act as such for five years from the 31st of December next after such designation, or until the earlier close of his official term.

By section 5, such general terms are declared to have all the powers and jurisdiction which, under then existing laws, belonged to the general terms of the court. (*Laws of 1870, ch. 408, p. 947.*)

In accordance with the provisions of this act, the Governor, on the 25th of May, 1870, designated the following as presiding justices and associate justices for each of the judicial departments, to compose the general term therein, viz :

1st Department. DANIEL P. INGRAHAM, presiding justice, and ALBERT CARDOZO and GEORGE G. BARNARD, associate justices.

2d Department. JOSEPH F. BARNARD, presiding justice, and JASPER W. GILBERT and ABRAHAM B. TAPPEN, associate justices.

3d Department. THEODORE MILLER, presiding justice, and PLATT POTTER and JOHN M. PARKER, associate justices.

4th Department. JOSEPH MULLIN, presiding justice, and THOMAS A. JOHNSON and JOHN L. TALCOTT, associate justices.

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ERRATA—56TH BARBOUR.

Page 551, lines 5 and 10; strike out "1 R. S. 184," and "2 id. 517," and insert "2 R. L. 184," and "2 R. S. 517."

CASES
IN
Law and Equity
IN THE
SUPREME COURT
OF THE
STATE OF NEW YORK.

ANNA TAIT *vs.* SALINA CULBERTSON and ANDREW CULBERTSON, her husband.

At common law an action lay against husband and wife jointly, for a libel written and published by the wife, alone; and a general judgment could be rendered against them both, if the charge were established. This rule has not been changed, by statute, in this State.

APPEAL from an order denying a new trial, and from a judgment rendered for the plaintiff, against both defendants, on a verdict.

Brown & Beach, for the appellant.

Hubbard & Wright, for the respondent.

Tait v. Culbertson.

By the Court, FOSTER, J. The only question in the case is whether an action can be maintained against husband and wife for a libel uttered and published by the wife.

The action was tried at a circuit court held in and for the county of Jefferson, before MULLIN, J., and a jury.

The libel against the plaintiff was proved to have been uttered and published by the defendant Salina Culbertson alone; and it appeared that she was, at the time of such publication, the wife of the defendant Andrew Culbertson, and so continued at the time of the trial.

At the commencement of the trial the defendant Andrew Culbertson moved to dismiss the complaint as against him, substantially on the ground that he could not be made liable for the libel of his wife, and was therefore not a proper party to the action. The motion was denied, and the defendants' counsel excepted. At the close of the plaintiff's testimony, and again at the close of the whole evidence, a motion was made on behalf of the husband for a nonsuit upon the same grounds, which the court denied, and to which decision the defendants' counsel excepted. The court was then asked to direct a verdict for the husband, which it refused, and "charged the jury that if they found that the defendant Salina Culbertson, the wife of the defendant Andrew Culbertson, wrote and published the alleged article, and found a verdict against her, then the plaintiff would be entitled to a general verdict against both defendants." To which refusal, and also to which charge, the defendants' counsel excepted.

The jury found a verdict against both defendants for \$500. A motion for a new trial was made, on the judge's minutes, and was denied; which was excepted to by the defendants' counsel, and judgment was entered according to the verdict, for the plaintiff, for damages and costs, and the defendants appealed.

The counsel do not question that, at common law, the husband could be sued jointly with his wife, for a libel

Tait v. Culbertson.

uttered by her alone, or that in such action judgment could be rendered against them both, if the charge against her were established; and of course the rule is the same now, unless it has been changed by act of the legislature, which, it seems to me, there is not the least pretext for assuming.

The common law has been so far changed that a married woman may take, hold, convey and use property independent of her husband, as if she were a *feme sole*. She may engage in business on her own account, with her own separate property. She may make herself liable on her contracts, in regard to her separate estate and business, and for such liabilities she may and must be sued alone; and she may and must maintain actions alone, for claims arising out of her separate estate and business, or for injuries committed against her person or character.

But while the statute authorizes her, in very broad terms, to dispose of her separate property, as if she were sole, it is held that she cannot do so to her husband, for his disability to take from her by a conveyance still continues, notwithstanding the comprehensive general language used in the statute. (*White v. Wager*, 25 N. Y. Rep. 328.) So, too, the act of 1862 declared that "any married woman may bring and maintain an action in her own name for damages, against any person, or body corporate, for any injury to her person or character, the same as if she were sole;" but this court held that she could not bring such action at law against her husband. (*Freethy v. Freethy*, 42 Barb. 641.) It would be easy to multiply the references to cases to show that the decision of the court below was correct; but I think it would be bestowing upon the question more importance than it deserves. It is sufficient to say that there is no language of any statute, general or special in its terms, from which the construction contended for by the appellant can be claimed; and the very cases cited in the points of his

Tait v. Culbertson.

counsel are in conformity with the rule adopted by the court, and do not militate in the least against it. As in the case of *Porter v. Mount*, (45 Barb. 422,) where it was held that an action could not be maintained against the husband, with his wife, to recover back excessive interest, paid upon a loan made by her, out of her separate estate. And the court puts its decision expressly upon the ground that the transaction related solely to her separate estate. And in the case of *Badgley v. Decker*, (44 Barb. 577,) where it was held that a married woman whose husband had abandoned her and his family, and resided in another State, could maintain an action for the seduction of her daughter, who was over twenty-one years of age, and was in the actual service of the mother, who was carrying on business on her own and separate account. And the court put the right of the mother to recover on the ground that the daughter was of full age, and of the actual service of the daughter in such separate business of the mother.

I have no doubt that the common law rights and duties in respect to the questions before us, have not been changed, and that the decision of the court below was correct.

The judgment should be affirmed.

[ONONDAGA GENERAL TERM, June 29, 1869. Bacon, Foster, Mullin and Morgan, Justices.]

WILLIAM C. GERE *vs.* JOHN GUNDLACH.

NICHOLAS PETERS and JACOB KNAPP *vs.* JOHN GUNDLACH.

For defects or irregularities not affecting the jurisdiction of the court, and where no fraud or collusion is imputed, the remedy is given to the party, alone; and another judgment creditor is not entitled to have such proceedings or judgment set aside.

An order for a substituted service of the summons and complaint, obtained upon a sheriff's return that the defendant cannot be found, that the summons and complaint cannot be served personally, and that he has left to avoid proceedings against him by his creditors, and upon an affidavit which does not contain the statements required by chapter 511 of the Laws of 1858, as amended by chapter 212 of the laws of 1868, is not warranted by the statute; and a service made under it will not confer jurisdiction.

The issuing of an attachment is "the allowance of a provisional remedy," within the meaning of section 189 of the Code of Procedure; and if it be legally issued, all questions subsequent are questions of regularity, and not of jurisdiction.

APPEAL from an order denying a motion to set aside the attachment, judgment and subsequent proceedings, &c., in the second above entitled action.

On the 15th day of January, 1869, the plaintiffs in that action caused to be issued to the sheriff of Onondaga county a summons and complaint in that action, with venue in that county, and the sheriff returned thereto, on the same day, that he had made proper and diligent efforts to serve the same on the defendant; that he could not be found; and that the summons and complaint could not be served personally; and it also appeared by the return, that the defendant was expecting trouble with his creditors and had left to avoid proceedings against him by them. This return, together with an affidavit of one Seifker, were on that same day presented to the county judge of Onondaga county, and he issued a warrant of attachment in the action, pursuant to the provisions of sections 227 to 231 of the Code of Procedure, which attachment was delivered to the sheriff, and a levy thereunder made, the same day, by him, on personal property belonging to the defendant,

Gere v. Gundlach.

to the amount of about \$100; and on the same day the respondents, on the same return and affidavit, obtained an order from the judge for a substituted service of the summons and complaint, but the affidavit on which such order for substituted service was obtained did not show "that the action was a partition case, or that no personal claim was made against the defendant, or that the defendant was not an officer, soldier or musician, actually absent from his place of residence, and actually engaged in the army or military service of the United States; nor a sailor or marine actually absent from his place of residence, and actually engaged in the naval service of the United States."

The sheriff, on the said 15th day of January, pursuant to the order, served the summons and complaint on the defendant, by leaving it with his wife, at his dwelling-house in said county; but no order for publication was made, and no personal service of the summons made on the defendant, except that within two or three days after the same was delivered to his wife, she handed them to the defendant.

No answer, demurrer or notice of appearance was served by the defendant, and on the 6th day of February the attorney for the plaintiffs entered up a judgment in their favor, against the defendant, for the sum of \$289.57 of damages and costs, and on the 8th day of February issued an execution, to the said sheriff, who levied it on the goods that he held by virtue of the attachment. An affidavit of the plaintiffs' attorney, that no answer, demurrer or notice of appearance had been served, and that more than twenty days had elapsed since the service of the summons and complaint, was drawn before the judgment was entered; but by mistake and inadvertence it was not verified, and on the 12th day of February an order was granted at special term, that the said verification be made that day, with the same force and effect as though made before the

Gere v. Gundlach.

judgment roll was filed; and that the order, or a copy thereof, be annexed to the judgment roll; which was done.

On the 19th of January, 1869, Gere commenced the first above entitled action by a summons personally served upon the defendant, and on the 9th day of February recovered a judgment therein against the defendant for \$90.13 of damages and costs, and on the same day issued an execution to the said sheriff to collect the same, and the sheriff levied the same on the aforesaid property.

Gere then moved the court, at special term, to set aside the attachment and judgment and execution in favor of Peters & Knapp, and directing the sheriff to pay the proceeds of the property levied on, to Gere; which motion was denied. From which order this appeal was taken, by Gere.

Charles E. Stevens, for the appellant.

Wm. J. Wallace, for the respondents

By the Court, FOSTER, J. The proceedings on the part of Peters & Knapp, in obtaining their judgment, were not authorized by the statutes, and were irregular; and there is no doubt that upon application of the defendant, made within a reasonable time, the court would have set them aside for that reason. But nothing can be clearer than that for defects, or irregularities, not affecting the jurisdiction of the court, and where no fraud or collusion is imputed, the remedy for such defects is given to the party alone, and that another judgment creditor is not entitled to have such proceedings or judgment set aside.

The only important question, therefore, is, did the court, in the action of Peters & Knapp, acquire jurisdiction or not.

The order for a substituted service granted by the county judge, was not warranted by the statute, upon the evi-

Gere v. Gundlach.

dence produced before him, for the reason that it did not contain the statements required by chapter 511 of the laws of 1853, as amended by chapter 212 of the laws of 1863, herein before quoted; and the amendment of 1863 declares that unless such affidavit shall show such facts, no such order shall be allowed by the court or judge.

If, therefore, the question of jurisdiction depended alone upon the service of the summons and complaint pursuant to the order, I should have no doubt that such service would not confer it. It is true that within two or three days, after such substituted service, the wife of the defendant handed over to him the copy of the summons and complaint so served, but such delivery to him was less than twenty days before the judgment was entered. But from the time of such delivery he knew that such irregular and void service had been made, and perhaps could and did, by not interfering to prevent or to set aside the judgment, waive the irregularity. But however that may be, (and I am not inclined to lay any stress upon it,) I think that for another reason the court did acquire jurisdiction of the action, and had all the subsequent proceedings under its control.

From what appears before us, on this appeal, we are not authorized to say that the county judge had no right to issue the warrant of attachment. It does not appear that all the evidence upon which the attachment was issued is before us. And even if that were the case, I think enough appears affirmatively to show that the evidence authorized the judge to determine whether to grant it or not. And the appellant does not seriously question the right of the judge to grant the attachment; but as to that, mainly relies upon the fact claimed, that the summons was not personally served, or a publication of it commenced within thirty days after the attachment was issued.

But the attachment was issued; and if it was legally

Christopher v. Van Liew.

issued, then all questions subsequent are questions of regularity, and not of jurisdiction; for the Code (section 139) provides that "from the time of the service of the summons, in a civil action, *or the allowance of a provisional remedy*, the court is deemed to have acquired jurisdiction, and to have control of all the subsequent proceedings." This language is too plain to admit of dispute, and there can be no question that the issuing of an attachment is "the allowance of a provisional remedy." (*Code, tit. 7.*)

And there is no reason appearing why, in this case, the court should give a strained construction of that section in order to favor the appellant. There is nothing to show that the demand of the respondents was not an honest one. But as I have no doubt in regard to the construction to be given to the 139th section of the Code, I will not further pursue the subject. The order appealed from should be affirmed, with \$10 costs.

[ONONDAGA GENERAL TERM, June 29, 1869. *Bacon, Foster, Mullin and Morgan*, Justices.]

CHRISTOPHER vs. VAN LIEW.

Where a justice of the peace, after rendering a judgment in favor of the plaintiff, by mistake entered the same in his docket as a judgment in favor of the *defendant*, and a transcript of such judgment being filed and docketed in the county clerk's office, the plaintiff was compelled to pay the judgment; *Held* that an action could be maintained by the latter, against the justice, as for an act of ministerial negligence and carelessness by which the plaintiff had been directly injured.

Such a case does not fall within the rule of judicial impunity for acts done by a judicial officer in the trial of causes and rendition of judgments; it being settled that the act of entering the judgment in the docket, by a justice, is a ministerial act, and is no part of the judicial function of rendering the judgment.

Where a justice swore that from the evidence before him in a case he "*found*

Christopher v. Van Liew.

his judgment against the defendant and in favor of the plaintiff, for the sum of, &c., but upon entering *said judgment* in his docket he by mistake inserted the name of the defendant in the place of that of the plaintiff;" *Held* that this was to be understood as an averment that the justice had reduced his judgment to form, by his official act, and then made the mistake in entering the judgment so formed, upon his docket; and that the error was ministerial.

Held also, that the justice had the right to correct such a mistake in his docket, the moment he discovered it; the error being merely clerical.

A promise by a justice of the peace, who has by his own negligence and carelessness entered an erroneous judgment upon his docket, in favor of the defendant instead of the plaintiff, that if the plaintiff will make a motion in the county court to set aside the erroneous judgment, or the execution issued thereon, he will pay all the damages growing out of his mistake, in case the execution shall not be set aside, is not against public policy, and an action will lie upon it.

A PPEAL by the plaintiff from a judgment of the county court of Seneca county, reversing the judgment of a justice of the peace.

In 1865 the defendant was an acting justice of the peace of the town of Ovid, Seneca county. The plaintiff, Daniel Christopher, brought suit against one Samuel Smith for house rent, money lent and property sold, before this defendant, as justice. Samuel Smith appeared and put in a defense, to wit, for work, &c. Each party was sworn as to the correctness of his account, and it appears the justice took four days to decide. The justice was sworn in the subsequent proceedings instituted to set aside the execution issued on said judgment, and says, "that from the evidence in the case *he formed his judgment* against the defendant, (Smith,) and in favor of the plaintiff, (Christopher,) for the sum of \$37.13; but upon entering said judgment in his docket, made a mistake," &c. Such mistake consisted in entering judgment in favor of the defendant, instead of the plaintiff, in that suit.

Before twenty days had expired from the rendering of judgment, the justice (this defendant) notified Christopher that he had rendered judgment in his favor for \$37.13. He also informed the constable, who was sent by Chris-

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topher for an execution, within the same time, that he had rendered a judgment in favor of Christopher for \$37.13. The defendant being informed "that he had no right to correct the mistake," on the 27th of October, 1865, some forty-one days after the entry of judgment, gave a transcript of the judgment as it appeared on his docket, upon filing which transcript in the county clerk's office a judgment was docketed, and an execution issued thereon, against the plaintiff. This execution caused the first intimation Christopher had received that all was not right. He (Christopher) thereupon had an interview with the justice, (this defendant,) and it resulted in the defendant telling him to get Donaldson, an attorney, and see what could be done in the premises, and promised if he (Christopher) got beaten in the proceedings, he would make him whole, &c. Both Christopher and the justice saw and talked with Donaldson; proceedings were had in the county court of Seneca county to set aside the execution, &c. The defendant made an affidavit, and the result was Christopher did get beaten; he lost his claim against Smith, had to pay the judgment against himself, and paid out more money on account of the motion, and was put to more expense. Upon this promise, so made under the circumstances, this suit was commenced in justice's court, tried before a jury, and resulted in a judgment in favor of Christopher for \$100.28 damages and costs. The county court of Seneca county reversed the judgment rendered in justice's court. From that judgment of reversal the plaintiff appealed to this court.

Wm. V. Bruyn, for the appellant.

I. It is not claimed that there was any fraud on the part of the justice, in the case of *Christopher v. Smith*, or on the part of Smith, the defendant in that suit. But we do claim that by the gross blundering and inexcusable carelessness of the justice, (this respondent,) he is liable; they having

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occurred *not in his judicial* action, but in the course of his *ministerial acts*, and that without any promise on the part of the defendant, he would have been liable for the damages actually occasioned. 1. The act of the justice in misleading the plaintiff as to the true entry on his docket, also misleading the constable sent by Christopher for an execution, cannot be considered as *judicial* acts, and are in no wise excusable except upon the payment of the damages occasioned thereby. The plaintiff thereby lost his right to appeal. 2. The "forming of his judgment against Smith, and in favor of Christopher, for \$37.13," determined, doubtless, by adding up the items of account on either side and striking the balance, was clearly a judicial act; but the entry in his docket, of that determination, was purely a ministerial act, and the entry of judgment against Christopher, instead of in his favor, was a ministerial, and not judicial error. The statute is "directory, merely," and "judgment need not be entered in the docket within four days; it is good if entered there at any time after." (6 *Hill*, 38. 2 *Comst.* 134.) 3. The justice should have corrected his docket upon discovering the error. He had the right to do so. (1 *Cowen's Treatise*, 383, 3d ed. 9 *Wend.* 298.) The statute being "directory, merely," (2 *Comst.* 134,) suppose he had discovered his mistake the instant after transcribing it into his docket, before the ink was dry, could he not have altered or changed it? If then, why not after, so soon as discovered? 4. The mistake was a ministerial error, prejudicial to the plaintiff, and the same was perpetuated by the transcript, after the knowledge of the existence of the error. He certainly could and should have refused to certify the transcript from his docket, for the simple reason that his docket did not represent his decision, his judgment. Had this been done, Christopher's damages would have been materially diminished. Who could have harmed him for such a refusal, for such reasons?

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II. All these considerations pressing upon the mind and conscience of the defendant, when he learns by the execution against Christopher, in the sheriff's hands, what he has done, feeling that it is all the result of his mistake, his blunder and his fault, he enters into the contract, which is the foundation of this suit. 1. The consideration for such agreement was ample and sufficient. In consequence of it the plaintiff was put to additional costs and trouble. "So if the party promised suffers any detriment, that is a sufficient consideration, although the party promising does not receive any benefit." (1 *Wait's L. and Pr.* 86.) The fact that the plaintiff had been injured by the carelessness and gross blunder of the defendant would have been sufficient of itself. 2. This contract was not void because against public policy. Neither was it void for maintenance; there was no officious intermeddling by the defendant. Nor was it void for champerty; the defendant was not to participate in the profits resulting from a successful termination of the motion.

III. The learned county judge raises a new objection not raised in the court below by counsel for the defendant. Had the objection been taken on the trial that Donaldson was the plaintiff's counsel, it would have appeared more clearly that he was the man selected by the defendant to institute the proceedings. He was the agent of the defendant, and for aught that appears, the defendant directed him when to stop. Christopher certainly did not, but on the contrary, supposed the motion had been argued, and that all was done that could be done. There is no evidence that the motion was not argued. It is easy to conceive why the motion was not pressed in the county court. That court has no jurisdiction, except appellate. How easy it would have been to amend the pleadings, had the counsel made the discovery on the trial, which the county judge seems to have made, and to which he alludes.

IV. All the objections made by counsel as to the proof

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of the proceedings in the suit before the defendant, as a justice, were cured by the failure of the defendant to produce his docket and papers on the trial, in pursuance of the notice served on him January 17, 1867, the day before the first adjourned day. "A notice to produce a paper need be given but once, and if once regularly given, the party will be bound to produce on the trial, whenever it may be." (*Jackson v. Shearman*, 6 *John*. 19.) "And the notice, properly given in a justice's court, will be sufficient, even if the cause is removed to the county court, by appeal, and even tried there." (4 *Wend*. 63. 19 *John*. 337.)

1. Supposing the defendant did remove to the State of Michigan after the notice was served on him, and pending the suit, the defendant appeared by attorney on the trial, and the attorney should have produced them. 2. The statute requiring a justice, when he leaves a town, to file his docket, &c., with the town clerk, is directory, merely; and if they were there, it was as easy for the attorney for the defendant to bring them from the clerk's office, as for the plaintiff. 3. Because the defendant removed from the State during the pendency of the trial, cannot change the rule. If so, a simple change of residence might give the party changing a decided advantage. 4. The defendant was present on every adjourned day except the last; the motion to adjourn was on his behalf; and the evidence is not at all satisfactory that he had moved away.

V. For the foregoing reasons the judgment of the county court should be reversed, and that of the justice's court affirmed.

John E. Seeley, for the respondent.

I. It seems to be conceded that where a justice of the peace has jurisdiction, but errs in exercising it, he is not liable in an action for such error or mistake. (*Butler v. Potter*, 17 *John*. 145.) Where he has jurisdiction, an error of judgment does not subject him to an action. He is enti-

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tled to the same protection as judges of courts of record. (*Horton v. Auchmoody*, 7 *Wend.* 200. *Hoose v. Sherrill*, 16 *Wend.* 33. *Yates v. Lansing*, 5 *John.* 282. *Weaver v. Devendorf*, 3 *Denio*, 117.) Justice Beardsley thus broadly states the doctrine at page 120 of the latter case: "But I prefer to place the decision on the broad ground that no public officer is responsible, in a civil suit, for a *judicial determination*, however erroneous it may be, and however malicious the motive which produced it. Such acts, when corrupt, may be punished criminally, but the law will not allow malice and corruption to be charged in a civil suit, against such an officer for what he does in the performance of a *judicial duty*."

II. But the plaintiff's counsel attempts to show that there is a distinction between deciding a case submitted to the justice, and entering that decision upon the docket when it is made; that if any error occurred while doing the first, it was a judicial error, and if while entering the decision on the docket, it was a ministerial error. That for the former he is not liable, while for the latter he is liable. It seems to me that the formation of the decision in the mind of the justice, and entering it upon the minutes by him, are and must be presumed to be concurrent acts. It will hardly answer to insist upon such a subtle distinction, and contend for its application to courts of justices of the peace. In *Stephens v. Santee*, (51 *Barb.* 543,) Justice Johnson says: "The decision must be evidenced by some official act. A decision in the mind of the justice, unless it is entered in the docket, or in the minutes of the trial, is of no avail whatever. It is not a legal rendering of judgment, and will not constitute a judgment, in law." But the complaint in this case makes no such distinction. It charges that the defendant wrongfully and by mistake entered a judgment against the plaintiff for about \$38, when he should in justice and equity have rendered the judgment for the same amount

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in favor of the plaintiff and against Samuel Smith. The error complained of in the complaint is clearly a *judicial error*. The complaint does not state a cause of action. Even if a cause of action were made out by the evidence, the evidence having all been received under objection, the plaintiff was not entitled to recover.

III. The proofs show nothing else than a judicial error. There is no proof that the justice ever announced any decision contrary to the judgment entered on his docket, or ever made any entry in his minutes, or in any other place, different from the judgment upon the docket.

Conceding, for the purpose of the argument, as is intimated in 6 *Hill*, 41, that the mere transcribing of the judgment into the docket is a ministerial act, and for which the justice is liable, still, in order to charge a justice for an error in transcribing a judgment into his docket, it must appear that a judgment in some form was rendered, either by announcing it in open court, or by entering it upon his minutes. Until one of these acts is performed there can be no judgment.

The mere formation of a conclusion in the mind is not the rendition of a judgment. We can know what the judicial determination of a justice is only from the judgment he renders. The evidence of the mental purpose of Van Liew to render a judgment for Christopher, cannot be shown. His intention is to be inferred only from his acts. (51 *Barb.* 532.) "The evidence of a voter as to his mental purpose in depositing the ballot is not admissible; but his intention is to be inferred from his acts." (*People v. Saxton*, 22 *N. Y. Rep.* 309.)

IV. The county court properly reversed the judgment of the justice, because the proof of the judgment rendered by Van Liew was improperly received. His docket should have been produced and proved. (*White & Hall v. Hawn*, 5 *John.* 351. 3 *R. S.* 459, § 192, 5th ed.) But Christopher claims that he served Van Liew with a notice to produce

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his docket on the trial, and the defendant not having produced it, that he had a right to give parol evidence of its contents. The reply to that was that Van Liew had moved out of the State, and the statute required that he should deposit his docket in the town clerk's office. (3 *R. S.* 458, § 184, 5th ed.) We are to presume it was so deposited. The plaintiff knew he had removed from the State. He had not laid the foundation for parol proof of the judgment. The statute requires the justice of the peace, in case he removes out of the town in which he was elected, either before or after his term of office expires, to deposit with the town clerk of such town all books and papers in the custody of such justice, relating to any cause or matter which may have been heard by him, or relating to any proceeding or cause which shall have been commenced before him. (3 *R. S.* 458, § 184, 5th ed. 2 *id.* 271, § 252, 2d ed.) No evidence was offered by the plaintiff to show that the docket of the defendant was not on deposit with the town clerk, as the statute requires. We must presume it to be there. Where the statute requires an officer to perform certain duties, the law will presume that he has done his duty. (*Hilts v. Colvin*, 14 *John.* 182.) There was, then, no foundation laid for the parol evidence of the judgment, and it was therefore improperly received.

V. It is claimed that the defendant had no right to give a transcript of the judgment which he had rendered against the plaintiff, to Samuel Smith. The answer is, that having rendered a judgment in favor of Smith he could not withhold the transcript of judgment when demanded. It was a right given by statute to Smith to have a transcript of the judgment which he might docket in the clerk's office of the county where the judgment was rendered. (*Code*, § 63.) The plaintiff seems to act on the principle that the justice had the power to correct his own judgment, and knowing that it was a mistake, he acted wrongfully in giving a transcript. The justice had no

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power to alter his own judgment when once rendered. (*See People ex rel. Phelps v. Delaware Com. Pleas*, 18 *Wend.* 558.) And it would be erroneous and unjust to say that he acted wrongfully in doing what the statute required. If there was a mistake, it could have been reviewed by appeal in the way provided by statute.

VI. The transcript of the judgment was improperly admitted, the certificate being imperfect; but being admitted, Christopher was estopped from contradicting it. It was not admissible for him to show it was a mistake. The admissions of Van Liew, or even the affidavit of Van Liew, that he had made a mistake, could not be received to establish that fact. (*See 22 N. Y. Rep.* 309, *above cited.*) The judgments of courts of justices of the peace cannot be corrected or changed in this manner. Mr. Van Liew is not the first justice of the peace who has admitted that he has made a mistake and rendered judgment for the wrong party. Every magistrate who has had much experience in litigation, must have seen his mistakes and admitted them; but he did not thereby render himself liable, in an action, for such mistake.

VII. The plaintiff said in the court below that he relied mainly upon the agreement made between Van Liew and Christopher for a reversal of the judgment. Mr. Van Liew said to Christopher, "You go on and do the best you can towards getting it reversed, and if you get beat in it I will make you whole; will pay the amount of the judgment, and amount of the debt and costs." This agreement, if ever made, was void, being against public policy, also void for maintenance, and was champertous. (26 *How.* 213. 22 *Wend.* 406. 6 *Cowen*, 431.) Further, if this agreement is held valid and binding, the appellant does not show that he had performed his part of it. The motion was never in fact made, by Christopher's counsel; only notice was given by Christopher's counsel, but at the time appointed he did not appear. An order was entered

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upon Christopher's default, "denied, with \$7 costs of opposing, and without prejudice to defendant's right to renew this motion." If he, Christopher, relied upon such a contract, he ought at least to show that he had in good faith attempted to get the judgment set aside, before he claims to recover on this absurd contract.

- VIII. The position of the appellant, that not having known the mistake until after the time to appeal had expired, he could have no relief except to sue the justice, was erroneous. He knew of the mistake before he paid the judgment. If the judgment was obtained by fraud or mistake, he had relief against it in equity. (*Huggins v. King*, 3 Barb. 616. *Farrington v. Bullard*, 40 id. 517. *White v. Merritt*, 3 Seld. 352.)

IX. There was no cause of action stated in the complaint. There was not sufficient evidence to sustain the action. The motion for a nonsuit was clearly right and should have been granted. The decision of the county judge reversing the judgment should be affirmed.

By the Court, JOHNSON, J. The statute requires a justice of the peace, after the trial of an action before him, to "render judgment," and "enter the same in his docket" within certain prescribed times. (2 R. S. 247, § 124.) The action, in the case which forms the subject of this action, was tried before the defendant as a justice, and he afterwards, and within the proper time, adjudged and determined in some manner, that the plaintiff was entitled to a judgment against the defendant, in such action, for the sum of \$37.13 damages, and \$4.06 costs. But instead of entering that judgment upon his docket, the justice by mistake reversed the parties, and entered a judgment for the same amount in the defendant's favor, against the plaintiff. This mistake was not noticed by the justice, at the time, and he informed the plaintiff, within a short time thereafter, that he had rendered judgment in his

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favor. The defendant in the action called afterwards upon the justice, and it was then discovered that the judgment had been entered upon the docket in the defendant's favor. The defendant thereupon demanded a transcript of the justice, and he supposing he had no right to correct his mistake, gave the defendant a transcript of the judgment, as docketed, and the same was duly filed and docketed in the office of the county clerk of the proper county. This mistake did not come to the knowledge of the plaintiff until it was too late to appeal, and he was compelled to pay the judgment, upon execution issued thereon.

It was certainly an act of gross carelessness on the part the defendant, as such justice, to enter the judgment in his docket in favor of the party against whom it had been rendered by him. And this carelessness and negligence has been the direct cause of injury and damage to the plaintiff. But whether the defendant, as justice, is liable in an action for such negligence, perhaps is not entirely free from doubt. It is claimed, on his part, that it falls within the rule of judicial impunity for acts by a judicial officer, in the trial of causes and rendition of judgments. It has been held that the act of entering the judgment in the docket, by the justice, was a mere ministerial act, and was no part of the judicial function of rendering the judgment. (*Hall v. Tuttle*, 6 Hill, 38. *Sibley v. Howard*, 3 Denio, 72.) This seems to be in accordance with the statute, which evidently contemplates that the judgment shall be first rendered by the justice, and then entered in his docket. The entry of the judgment in the docket when rendered, is no more a judicial act than that of issuing an execution after such judgment has been rendered and docketed. Each is alike ministerial in its character.

Should a justice issue to a constable an execution, in favor of the defendant, against a plaintiff, upon a judgment in favor of the latter against the former, and thus

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cause the same to be collected from the wrong party, I suppose there can be no doubt that he would be liable to the injured party. In such a case there would be no judgment to support the execution, and the act would be wholly without jurisdiction. The act here would seem to partake of the same character. A different judgment was entered in the docket from the one actually rendered by the justice. He must enter the judgment rendered by him, and has no power or authority to enter any other.

There can be no serious doubt, I think, that had the defendant entered the judgment in his docket as it was in fact formed and rendered by him, in the plaintiff's favor, and in making out a transcript of that judgment, to be filed in the county clerk's office, and there docketed as a judgment of the county court, made a mistake, and transposed the names, so that it should be docketed as a judgment in favor of the other party, it would have been a wrong for which an action would lie, after such judgment had been enforced by the other party.

The mistake and wrong, here, are of a similar character to that above supposed. Both are, I think, ministerial, and not judicial, in their character.

It is claimed in behalf of the defendant, that he never rendered any other judgment in the action than the one entered in his docket. This court held, in *Stephens v. Santee*, (51 Barb. 532,) that a decision in the mind of the justice, merely, without being evidenced by any official act whatever, was not a rendering of a judgment, within the meaning of the statute. That before a judgment can be rendered, there must be some official action upon it, other than a mere operation of the mind. We also held in that case, that a judgment was not completed, so that it could be enforced by execution, until it was entered in the docket. This, however, does not affect the question as to whether the entry in the docket is a ministerial act, or otherwise. The county judge is, I think, clearly mis-

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taken in the assumption that the proof fails to show that the defendant decided the action in the plaintiff's favor, and that he was entitled to judgment.

There is no dispute about the facts in this case. We have the defendant's statement of the facts, under oath. In his affidavit made for the purpose of a motion to set aside the execution issued upon the transcript of the judgment as filed and docketed, he says that "deponent, from the evidence in the case, *formed his judgment*, against the defendant and in favor of the plaintiff, for the sum of \$37.13, but upon entering *said judgment* in his docket, he by mistake inserted the name of the defendant in the place of that of the plaintiff." Here we have the fact from the defendant himself, that he "formed his judgment," but that in entering "*said judgment*" in his docket he made the mistake. As I understand this, he had reduced his judgment to form by his official act, and then made the mistake in entering the judgment so formed, upon his docket. Upon this view of the case, I am of the opinion that the defendant is liable as for an act of ministerial negligence and carelessness, by which another has been directly injured. It is clear, I think, that the justice had the right to correct such a mistake in his docket, the moment he discovered it. He has no right to correct any error or mistake in making up or in rendering his judgment, after it has been completed by entering it in the docket as rendered; but when the mistake is in the entry, merely, so that the judgment entered does not conform to the one actually rendered, then the entry may be corrected, to make the judgment, as entered upon the docket, conform to that actually rendered. A mistake of that kind is merely clerical, and may be corrected. The defendant not only neglected to correct his mistake when he discovered it, but followed it up, and placed it beyond his power to make a correction, by giving a transcript,

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and thus causing it to be made the judgment of the county court.

It is perhaps unnecessary to a determination of this case, to hold that the action could be maintained upon the carelessness and negligence in making the entry upon the docket, because I am also of opinion that the action will lie upon the promise. This promise is in no respect against public policy, as I conceive. The defendant had not erred in rendering the judgment. The judgment "formed" or rendered by him was the correct one. He had entered a judgment upon his docket which he had never rendered. This was gross carelessness, and operated in the end to the plaintiff's injury. The consummation of this injury the defendant thought might be prevented by a motion to the county court to set aside the execution which had been issued. He therefore promised the plaintiff that if he would make the motion to set aside the erroneous judgment or execution, in the county court, he would pay all the damages growing out of his mistake, in case the execution should not be set aside. In pursuance of this promise the motion was made. It failed, as any lawyer would have known it must, as there was nothing in the county court by which the mistake could be rectified and the error corrected. There was nothing there to correct by. But this is of no consequence in respect to the agreement. The plaintiff complied with its terms, on his part. He performed the condition, and the event on which the defendant agreed to become liable happened. I do not see, therefore, why he is not liable upon his promise, even conceding there was no liability on the other ground. The plaintiff employed and paid counsel who made the motion, and detriment thereby accrued to him at the instance of the other party. This is a good consideration to uphold a promise. It is said in the opinion of the county judge, that the motion to set aside the execution was not made by the

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plaintiff, but was dismissed by reason of the plaintiff's non-appearance to make it in pursuance of his notice. I think, upon the agreement, the plaintiff was bound to have the motion brought to a hearing, in order to fulfill on his part. But, upon the evidence, it seems to me the jury were authorized to find that the motion was in fact made and denied. It is evident from the testimony in the case, that the parties so understood it. In addition to this, the motion papers in the county court were produced, which were on file, with the indorsement thereon in the hand-writing of the county judge, "denied with \$7 costs of opposing, and without prejudice to defendant's right to renew this motion."

It seems that an order had been entered dismissing the motion for the default of the plaintiff in not appearing. But upon the whole evidence the jury might well have found, as the fact probably was, that the default had been waived, or opened, and the motion heard. On this ground, also, I think a good cause of action was established.

The judgment of the county court should therefore be reversed, and that of the justice affirmed.

[MONROE GENERAL TERM, December 6, 1869. *E. D. Smith, J. C. Smith and Johnson*, Justices.]

DANIEL LANNING, late sheriff &c. *vs.* DANIEL W. STREETER,
executor, &c.

A sheriff, after having, in the manner prescribed by section 235 of the Code, executed an attachment upon a debt due from a third person to the defendant therein, may maintain an action against such debtor, to recover the amount of the debt attached, or so much thereof as will be sufficient to satisfy the judgment in the attachment suit; provided there was in fact an indebtedness existing from such debtor to the defendant in the attachment suit, at the time the attachment and notice were served on the former.

When an attachment is thus executed by serving upon the debtor a copy of the warrant, and a notice therewith showing the property levied on, the sheriff acquires a specific lien upon the debt, if there is one; and that is a sufficient interest to enable him to maintain an action for its recovery, or enough thereof to satisfy the judgment recovered in the attachment suit.

In order to enable the sheriff to bring the action, however, he must have actually levied upon such debt or property and subjected it to the attachment in his hands.

But where, in such an action, the sole cause of action alleged in the complaint was that at the time of service of the attachment the defendant in such action was indebted to the defendant in the attachment suit, for property received and converted into money, and for money had and received, in the sum of more than \$500, and that he had refused to pay the same to the plaintiff; and the referee failed to find that the defendant was indebted to the defendant in the attachment suit, at the time the attachment and notice were served on him, but merely found that the former had in his hands a specified sum, the property of and belonging to the latter; *Held* that no cause of action was shown.

Where property fraudulently assigned has been converted into money by the assignee, or the money has been converted into other property which is claimed by the assignee to belong to him, before an attachment in an action by the creditor is issued, the attachment cannot be levied upon the money or property so held as the proceeds of that assigned, and the sheriff can maintain no action against such assignee by virtue of the attachment in his hands, to recover such proceeds.

In such a case the avails are held by the fraudulent assignee as trustee for the creditors of the assignor, and can be reached only by an action in the nature of a creditor's bill, which a sheriff cannot maintain.

Where nothing but the debt is attached, the sheriff can only maintain an action against the alleged debtor by proving the existence of a debt from him to the defendant in the attachment suit which the latter could enforce by action.

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APPEAL by the defendant from a judgment entered upon the report of a referee.

The facts are stated in the opinion of the court. On the hearing before the referee, after the plaintiff had given evidence tending to show that at the time of serving the attachment Traver had money in his hands which had been fraudulently placed there by John Shoemaker, Jr., under some fraudulent assignment; and after the proof on the part of the plaintiff was closed, the counsel for the defendant moved that the complaint be dismissed upon the following grounds:

1. That the action being for money, and as under the evidence John Shoemaker could maintain an action against Traver, the sheriff could not.

2. That the attachment had not been executed according to law, and no lien had been acquired, the sheriff not having made any return or inventory.

3. That there had been no attempt on the part of the sheriff to obtain the certificate under the 236th section of the Code; that said certificate should have been obtained before bringing the action.

4. That judgment in the action of Smith Shoemaker against John Shoemaker, having been obtained 18th May, 1858, the attachment being a provisional remedy, ceased upon the entry of judgment; that before the sheriff could maintain any action after judgment, execution should have been issued to him upon said judgment.

The motion was denied by the referee, to which the counsel for the defendant duly excepted.

The referee reported in favor of the plaintiff for \$410.79, besides interest and costs.

D. B. Prosser, for the appellant.

- I. The motion on the part of the defendant, at the close of the evidence on the part of the plaintiff, that the complaint be dismissed, ought to have been granted, because,

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1. The only property attempted to be attached in the hands of Traver, as appears by the notice served with the attachment, "was a debt of about \$500 owing by Traver to John Shoemaker, Jr., for the avails of property belonging to Shoemaker, sold by Traver, and for money belonging to Shoemaker, then in the hands of Traver." The allegations in the complaint are, "that Traver was indebted at the time of serving the attachment, for property received by him and converted into money, and for money received." Under the notice served with the attachment, and the allegations in the complaint, unless there was such an indebtedness of Traver to Shoemaker at the time of serving the attachment, that an action could have been maintained by Shoemaker against Traver, to recover the same, the sheriff cannot maintain this action under the attachment. (*Lawrence v. Bank of Republic*, 35 N. Y. Rep. 320-2. *Greenleaf v. Mumford*, 4 Abb. N. S. 130.) The evidence on the part of the plaintiff clearly shows that no action could have been maintained by Shoemaker against Traver for or on account of the transactions disclosed by the evidence. There is no allegation of any fraud on the part of Traver in the complaint, or that Traver was attempting fraudulently to cover up Shoemaker's property; and if there had been, that would not have enabled the sheriff to maintain the action. The sheriff cannot bring a creditor's action. He does not sustain the relation of a creditor by his proceeding under the attachment. (*See authorities cited above.*) The sheriff, under the attachment, is not in a condition to attack the transaction between Traver and John Shoemaker, Jr., as fraudulent as against the creditors of Shoemaker. Under the 232d section of the Code, the sheriff can only attach and recover such debts as Shoemaker could have recovered in an action in his own name if the same had not been attached. (*Lawrence v. Bank of Republic*, 35 N. Y. Rep. 322, 323.) 2. The attachment was not executed so as to confer any rights

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upon the sheriff under the 232d section of the Code, and no lien or right was acquired by the sheriff under the same. There was no inventory made or returned by the sheriff, which, according to the provisions of the 232d section, is required. Such inventory should have been made and returned before the sheriff could acquire any right under the process. He should, at least, be required to comply with the law in executing the process. The latter clause of the section provides that he "may take such legal proceeding, either in his own name or in the name of the defendant, as may be necessary for that purpose, &c., and discontinue the same at such time and on such terms as the court or judge may direct." Unless an inventory is made and returned, it is evident that there is nothing upon which the court or judge could give directions. 3. Before an action should be permitted to be brought by a sheriff under an attachment to recover a debt or demand due to the defendant, he should have obtained the certificate provided for in the 236th section of the Code. Ample provision is made in that section for obtaining such certificate. Upon obtaining the certificate the sheriff would then be in a condition to make and return his inventory. 4. Judgment having been obtained in the attachment suit by Smith Shoemaker, the plaintiff therein, against John Shoemaker, Jr., on the 18th May, 1858, more than a year and a half prior to the commencement of this action, January 25th, 1860, execution should have been issued and placed in the hands of the sheriff, in order to have authorized him to commence this action after payment.

II. The sale of the personal property of Shoemaker upon the judgment and execution in favor of Traver having taken place nearly two months before the commencement of the action by Smith Shoemaker against John; and the order of the special term, vacating and setting aside the judgment in favor of Traver, so far as it affects the lien of the judgment in favor of Smith Shoemaker,

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having been obtained more than a year after the sale of the personal property of John Shoemaker on the execution in favor of Traver, did not give or create a lien upon the proceeds arising from said sale.

The referee erred in his conclusions of law that Traver was not entitled to retain any part of the proceeds arising from the sale of John Shoemaker, Jr.'s personal property under the execution in favor of Traver; because, 1st. The execution in favor of Traver was executed and returned more than one month before the action was commenced by Smith Shoemaker, and before the issuing of the attachment; and the order does not in any way attempt to vacate or set aside the execution; the order simply vacates and sets aside the judgment so far as it affects the priority of the lien of the judgment in favor of Smith Shoemaker. 2d. No execution having been issued upon the judgment in favor of Smith Shoemaker against John Shoemaker, Jr., Smith Shoemaker never had any lien upon the personal property of said John Shoemaker. The judgment was no lien upon personal property; lien upon personal property only attaches upon the issuing and delivery of execution to the sheriff. (*Beals v. Guernsey*, 8 John. 446. *Ray v. Birdseye*, 5 Denio, 619. *S. C.*, 4 Hill, 158.) The actual issuing of an execution was necessary in order to create a lien upon personal property. As no execution was ever issued, there could be no lien. The order of the special term cannot in any way affect the execution in favor of Traver, and the sale under the same.

III. The referee erred in finding that on the 9th day of February, 1858, at the time of serving the attachment, there was in the hands of Traver the sum of \$451.73, the property of and belonging to John Shoemaker, Jr. Such finding is contrary to the other facts found by the referee, and is more in the nature of a conclusion of law than a finding of a fact. The referee finds as a fact that Traver received, on the sale of Shoemaker's property upon the

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execution in his favor, the sum of \$580.73. And some time about the 3d of December, Traver received from John Shoemaker, Jr., the sum of \$878.63, proceeds of a farm sold by Shoemaker, making in all the sum of \$1459.36. This is the sum total which was received by Traver from Shoemaker, or the proceeds of Shoemaker's property. There is no pretense that Traver received a farthing from any other source, which had any connection with Shoemaker or his property.

The referee finds that \$300 of the \$878.63, was loaned by the direction of Shoemaker, at the time it was received by him, to one Keefer, and Keefer's note taken, payable to the wife of Shoemaker, and during the month of December, 1857, Traver paid debts of John Shoemaker, Jr., to the amount of \$307.62, and on the 4th day of January, 1858, Traver paid to the wife of Shoemaker \$300, making in all the sum of \$907.62 paid out by Traver, of the moneys received by him of Shoemaker, prior to the 5th of January, 1858, one month prior to the issuing of the attachment; leaving the sum of \$551.74 in the hands of Traver, including the sum of \$580.73 received of Traver, upon the sale of Shoemaker's personal property upon the execution in Traver's favor against Shoemaker. There can be no question or doubt that Traver, as against John Shoemaker, Jr., had a perfect right to the proceeds arising from the sale of Shoemaker's personal property on the execution in his favor; nor can there be any question but that Traver would have had a perfect right to retain a sufficient amount of the sum placed in his hands by Shoemaker to satisfy the balance due upon his judgment. The judgment was a valid judgment against John Shoemaker, which he could not dispute or question. The most that can be legally claimed on the part of the plaintiff, as sheriff, under the complaint in this action, by virtue of the attachment and his proceedings thereon, is that he is substituted in the place and stead of John Shoemaker, Jr., the de-

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fendant in the attachment, and can only enforce such rights as could have been enforced by said Shoemaker in case no attachment had been issued. (*Code*, § 232, and *the authorities before cited*.)

IV. The referee erred in his conclusion of law that the plaintiff was entitled to judgment. The facts found do not warrant any such conclusion of law. The referee wholly failed to find that Traver was indebted to John Shoemaker, Jr., at the time of serving the attachment. The finding that Traver had in his hands, at the time of the service of attachment, \$551.74, the property of, and belonging to, John Shoemaker, Jr., is not finding that Traver was indebted to Shoemaker.

D. J. Sunderlin, for the respondent.

I. If Traver, in fact, had money in his hands belonging to John Shoemaker, or owed him money, or was liable to account to him for money at the time of the service of the attachment, then the attachment created a lien upon such money, and the proper way to reach it was, by action, either in the name of the original plaintiff (*Code*, § 238) or in the name of the sheriff. (§§ 232, 237, *subd.* 4.)

In *Orser, sheriff, v. Grossman*, (11 *How. Pr.* 523,) Judge Woodruff says: "The remedy is extraordinary; it is to operate in substance like an assignment by the absent debtor to the sheriff;" and the right of the sheriff to bring the action was not questioned.

That Traver had in his hands a large amount of money belonging to the absconding debtor when the attachment was served, was abundantly proved upon the trial, and has been found by the referee. His finding upon that question is final and conclusive. It is of no importance whether Traver owed it to John as a debt, whether it was a deposit, or whether he held it as a trust. It was enough that it was the money of John Shoemaker; and by operation of law the sheriff became the assignee, and Traver

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withheld it in contempt of the attachment. Nor is it material whether the money was described as a debt, or a trust, in the complaint, attachment or notice indorsed thereon; no person has been misled. The fact has been proved, without objection, and if necessary, the court will deem the proceedings amended so as to conform to facts proved, and facts found by the referee, for the purpose of sustaining the judgment. (*Code*, § 173. *Rayner v. Clark*, 7 *Barb.* 581. *Harrower v. Heath*, 19 *id.* 331. *Clark v. Dales*, 20 *id.* 42, 67. *Bate v. Graham*, 1 *Kernan*, 237. *Lounsbury v. Purdy*, 18 *N. Y. Rep.* 515, 521. *Bennett v. Judson*, 21 *id.* 238, 240. *Bank of Havana v. Magee*, 20 *id.* 355.) In this last case, Judge Denio says: "The courts are directed, in every stage of an action, to disregard any error or defect in the pleadings or proceedings, which shall not affect the substantial rights of the adverse party, and they are forbidden to reverse a judgment for any such error or defect. (*Code*, § 176.) The learned judge further says: "The mandate is addressed to this court, equally with the court of original jurisdiction."

II. In reviewing a judgment, this court is not to re-try the action, but is only at liberty to correct errors which appear affirmatively upon the papers; and unless it shall appear that some rule of law has been violated in the rulings of the referee upon the trial, or in his findings upon questions of law, the judgment should be affirmed. (*Simmons' executors v. Sisson and others, per Welles, J., in MS.*) Every legal intendment is in favor of the judgment, and even though it should be objected that the findings of fact by the referee are not as full in every particular as the counsel may desire, yet there is no exception founded upon such omission, and the question cannot be considered in this court, on appeal. It is enough that Traver had money in his hands belonging to the absconding debtor, and wrongfully withheld it from the creditors of such debtor; the law pronounces it a contempt of the

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attachment, and the referee decided that the plaintiff was entitled to judgment. It should be remembered the defendant makes his case and exceptions on which to appeal. There is no exception intimating that the referee omitted to find any fact essential to the right of recovery on the part of the plaintiff, nor was the referee required to find any fact which was deemed essential to a defense, or any exception for such omission. But the counsel must stand upon his case as made, with every presumption in favor of the judgment. It is therefore submitted that the judgment should be affirmed, with costs.

By the Court, JOHNSON, J. This action was brought by the plaintiff, as sheriff of Yates county, against Jasper Traver, now deceased, and the present defendant has been duly substituted as his executor. The foundation of the action is a debt, alleged to have been due from said Traver, on the 9th of February, 1858, to John Shoemaker, Jr. This alleged debt, the plaintiff, as such sheriff, attached in the hands of Traver, by virtue of an attachment, issued and placed in his hands, in a certain action in this court, brought by Smith Shoemaker against the said John Shoemaker, Jr. The attachment in that action was issued upon the ground that said John Shoemaker, Jr., had departed from the State with intent to defraud his creditors. The notice, served by the plaintiff on the said Traver, with the copy of the attachment, was that the property levied on by virtue of such attachment was "a debt of about \$550, owing by you to the said defendant for the avails of property belonging to him and sold by you, and for money belonging to him and now in your possession or under your control, and you are hereby forbidden paying the said debt to any person other than the said plaintiff or his attorneys." Judgment was recovered in that action, in favor of the plaintiff therein, against the defendant, for \$410.79, damages and costs, in May, 1858. The attach-

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ment and notice in that action were served upon Traver, the defendant's testator, on the 9th of February, 1858.

This action was afterwards, though at what time does not appear, brought by the plaintiff, as sheriff, to recover the amount of the debt attached, or so much thereof as would be sufficient to satisfy the judgment in that action. The sole cause of action alleged in the complaint is that at the time of the service of the attachment in that action the said Traver was indebted to the said John Shoemaker, Jr., for property received and converted into money, and for money had and received of said John Shoemaker, Jr., in the sum of more than \$500, and that said Traver had refused to pay the same to the plaintiff although often requested so to do. The answer of Traver denied his indebtedness to said Shoemaker. It is objected on behalf of the defendant that the sheriff cannot maintain such an action. But I see no difficulty in the way of the sheriff bringing and maintaining such an action if there was in fact an indebtedness existing from Traver to Shoemaker, at the time the attachment and notice were served on the former. The debt, if it existed, was incapable of manual delivery, and the attachment was executed upon it in the manner prescribed by section 235 of the Code, by serving the copy of the warrant and a notice therewith showing the property levied on. By this means the sheriff acquired a specific lien upon the debt, if there was one, and that is a sufficient interest to enable him to maintain an action for its recovery, or enough thereof to satisfy the judgment recovered in the attachment suit. The sheriff is expressly authorized to bring such an action by the Code, section 232; also section 237, subdivision 4. (*Rinchey v. Stryker*, 28 N. Y. Rep. 45.) But in order to enable the sheriff to bring the action in any such case, he must have actually levied upon such debt or property and subjected it to the attachment in his hands. If he has not done this he can have no right of action to recover such debt or property

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against any one. Of course, if there was no debt in this case from Traver to Shoemaker, the action must fail. The debt was the only thing levied upon by the plaintiff, in the hands of Traver, or attempted to be, and is the only cause of action set out in the complaint.

The referee, it will be seen, has not found, upon the evidence before him, either as matter of fact, or as a conclusion of law, that Traver was indebted to Shoemaker at the time the attachment and notice were served on him. All that he has found upon that subject is that at that time "the said Jasper Traver had in his hands the sum of \$551.74, the property of and belonging to the said John Shoemaker, Jr. This clearly shows no cause of action. If Traver held Shoemaker's money in his hands at that time, the legal inference is that he held it as agent or bailee, and this would create no debt. As the fact of indebtedness was the only issue, and the referee has failed to find that he held it under circumstances which would make him the debtor of Shoemaker, or that he was in fact such debtor, no ground for a recovery is made to appear. Shoemaker's money in Traver's hands was not attached, but only a debt from the latter to the former. All that Traver was forbidden to pay over to Shoemaker, was the debt he was owing him. Anything else in his hands he might lawfully deliver over, unless it had been levied upon by the attachment. If he had Shoemaker's money in his hands, the idea is wholly excluded that he was indebted to Shoemaker for it, and there is no presumption that he had not paid it over long before this action was brought. It would be manifestly unjust to allow a recovery against Traver, or his estate, now, for money or property belonging to Shoemaker, which he then held, and which he had no right to keep, and which the law must presume, in the absence of all evidence to the contrary, he did not keep from the lawful owner. But it is enough for this case, to say that the conclusion of law arrived at

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by the referee, that the plaintiff was entitled to recover, because the defendant's testator had in his hands the money of Shoemaker, at the time of the service of the attachment and notice, is erroneous, and cannot be upheld. The plaintiff acquired no right to it if he did not levy upon it, and no cause of action accrued to him, against any one, to recover it. Where property or money has been fraudulently transferred by a debtor, to a third person, for the purpose of hindering, delaying or defrauding the creditors of such debtor, the sheriff having an attachment against such debtor, may levy such attachment upon the property, or money, so assigned or transferred, and bring his action and contest the right of the person in possession, and prove the fraudulent transfer. This was held in the case of *Rinchey v. Stryker*, (*supra*.) But in such case the identical thing fraudulently assigned must be attached, and a specific lien acquired by virtue of the levy of the attachment. The creditor, in such a case, does not become the creditor at large of his debtor, by virtue of his action and attachment, but both himself, and the sheriff as his bailee, are confined to the property actually levied upon. But when the property so fraudulently assigned has been converted into money by the assignee, or the money has been converted into other property which is claimed by the assignee to belong to him, before the attachment in the action by the creditor is issued, the attachment cannot be levied upon the money or property so held as the proceeds of that assigned, and the sheriff can maintain no action against such assignee, by virtue of the attachment in his hands, to recover such proceeds. In such a case the avails are held by the fraudulent assignee as trustee for the creditors of the assignor, and can be reached only by an action in the nature of a creditor's bill, which a sheriff cannot maintain. This is well settled. (*Lawrence v. Bank of the Republic*, 35 N. Y. Rep. 320. *Campbell v. Erie Railway Co.*, 46 Barb. 540. *Greenleaf v. Mumford*, 35 How. Pr. 148.) It is

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quite apparent, upon examining the evidence and the report of the referee, that this distinction, which lies at the very foundation of the right of action by a sheriff, derived from his attachment, was wholly lost sight of or disregarded, by the referee. The whole case shows that the action was tried and determined as though it had been an action in the nature of a creditor's bill, and without any regard to the question of a specific lien by a levy under the attachment. As nothing but the debt was attached in this case, the plaintiff, as sheriff, could only maintain his action by proving the existence of a debt from Traver to John Shoemaker, Jr., which the latter could enforce by action. If he can make out such a claim only as the creditors of Shoemaker can enforce in equity, but which Shoemaker himself cannot enforce against Traver or his estate, the action can never be sustained. In the latter case the action must be brought by the plaintiff in the judgment, and be in the nature of a creditor's bill.

The judgment must therefore be reversed, and a new trial granted, with costs to abide the event.

New trial granted.

[MONROE GENERAL TERM, December 6, 1869. *E. Darwin Smith, J. C. Smith and Johnson*, Justices.]

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Where a person has been guilty of a burglary and a larceny at the same time, he may be indicted for either the burglary or the larceny, separately, and convicted of the offense charged.

There is no merger, in such a case, which is available to the accused by way of defense, until there has been a trial and conviction for the greater offense. Burglary and larceny, charged in the same indictment as having been committed on the same occasion, is a compound offense, and upon the trial the party accused may be convicted of either one, without the other.

If there has been a conviction for the burglary, a plea of *autre fois convict* would be a good answer and defense to a subsequent indictment for the larceny which was committed at the same time and by means of the burglary. It is all the same felony, and the lesser is merged and satisfied in the conviction and punishment of the greater.

So a conviction for the larceny which was committed by means of the burglary will constitute a bar to any subsequent trial and conviction of the defendant for the offense of burglary.

There cannot be two convictions for separate acts, constituting the same felony. If it is all the same felony, one conviction is a bar to any other, for the offense, of whatever degree.

A general exception to the charge of the court, not specifying any grounds of error, is of no avail, where there is no request to charge otherwise.

CERTIORARI to the general sessions of Wayne county, to remove a conviction for grand larceny.

The defendant was indicted in the Wayne county oyer and terminer, on the 9th day of November, 1868. The indictment contained four counts, charging, 1st. Grand larceny, in taking, &c., at the town of Galen, in said county, on the 28th day of June, 1868, one watch with a gold case, one hair watch chain with gold clasp, of the value of \$70, the property of one Joseph Stone. 2d. For grand larceny, at the same time and place, in taking, &c., one watch with a gold case, of the same value, and one hair watch chain of the value of \$10, the property of the said Stone. 3d. For grand larceny, at the same time and place, in taking, &c., one detached lever watch with gold case, of the same value, and one hair watch guard of the value of \$10, the property of said Stone. 4th. That on

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the same day and year, at the same place, the prisoner knowing the property mentioned in last count to have been before then stolen from said Stone, did feloniously have and receive the same.

The indictment was sent to the court of sessions of said county, and was tried therein at a term of said court, on the 17th day of June, 1869; and upon such trial a verdict of guilty upon the whole indictment was given against the defendant. A bill of exceptions was tendered by the prisoner, and signed and sealed by the court, and sentence suspended, and a writ of certiorari sued out by the district attorney of said county, bringing the indictment and bill of exceptions into this court.

On the trial it was proved on the part of the people, by Stone, the complainant, and David Benjamin, witnesses on the part of the people, that the dwelling-house of said Stone, in which he and other members of his family were at the time, was broken into and entered by the prisoner in the night of the day laid in the indictment, by raising and crawling through a window thereof, about 1 o'clock, midnight, and the property described in the indictment stolen by the prisoner from the said house while he was there. The value of the property was proved to be \$81. At the close of the evidence on the part of the prosecution, the counsel for the prisoner moved the court that the prisoner be discharged from the indictment aforesaid, or from further answering thereto, on the following grounds: 1st. That the said indictment sets forth and charges the prisoner with having, on the 28th day of June, 1868, at the town of Galen, in said county of Wayne, feloniously stolen, taken and carried away one gold watch and one hair watch chain with gold clasps, of the value of \$70, the property of Joseph Stone; and also with having, on the same day, feloniously received the same property, knowing it to have been stolen; while the proof or evidence shows that the prisoner was guilty of burglary, in

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feloniously breaking into and entering the house of Joseph Stone, aforesaid, situated in the town of Galen, in the night of said 28th day of June, 1868, while a human being was in said house, and taking from said house, after having feloniously broken into and entered the same, and while so therein, the property aforesaid, of the value aforesaid, being the property of said Stone; and that there was no allegation, in the indictment, of a burglary committed by the prisoner. 2d. That there was a material and fatal variance between the indictment and the proof. 3d. That the proof, or evidence, did not sustain the indictment. 4th. That the offense proved against the prisoner was not the same as that laid or charged in the indictment. 5th. That a conviction upon or under the indictment aforesaid would be no bar to a subsequent indictment, trial and conviction of the prisoner for burglary, proved on this trial to have been committed by him, in feloniously breaking or entering the dwelling-house of Joseph Stone, on the night of June 28, 1868, and taking therefrom the gold watch and chain.

The court separately overruled each of said grounds, and the prisoner duly and separately excepted to each of such rulings and decisions of the court.

When the evidence was closed, the counsel for the prisoner renewed the motion for the discharge of the prisoner, on the grounds above mentioned, which were separately ruled upon and denied by the court, and the prisoner duly and separately excepted to each of such rulings and decisions.

The court charged the jury: "If you believe the evidence, it is grand larceny, or receiving stolen goods, knowing them to be stolen." To this charge the prisoner duly excepted. The prisoner, as a part of his defense, put certain questions to, and offered evidence by, the witnesses Frederick Clark and Charles Purdy, which were objected

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to by the people, and the questions and evidence offered excluded by the court, and the prisoner excepted to such rulings and decisions.

Geo. F. Danforth, for the people.

I. None of the exceptions are well taken. The ground upon which they are placed by the defendant's counsel is, that the indictment is for feloniously stealing the property described therein, and feloniously receiving it, knowing it to have been stolen, while, as he asserts, the evidence shows that the defendant was guilty of a burglary in feloniously breaking into the house of Stone, and therefrom stealing the property aforesaid. 1. The evidence which must be relied upon to warrant this assumption, was not given to prove the commission of a burglary, but as part of the *res gestæ*. The witness Benjamin, in describing the mode of the defendant's approach to the property in question, says: "He stood by the window a little while; I then saw him crawling in the window." This was part of the narrative to prove the larceny, and not given to prove another felony; nor was it objected to by the defendant. If, however, the evidence is regarded as sufficient to prove a burglary, it does not aid the defendant; for, 2. If the defendant should hereafter be indicted for the burglary, his conviction under the present indictment would furnish him matter for a good plea in bar. (a.) The offense of burglary is not committed by simply breaking and entering the dwelling-house, but by doing so "with intent to commit some crime therein," (2 R. S. part 4, tit. 2, ch. 1, art. 3, § 10, p. 668;) and upon the facts assumed by the defendant, the crime "intended" by him was larceny, and the intent was carried into execution—the larceny was committed. The larceny, therefore, constituted part of the burglary. Having broken and entered, and stolen, an entire offense was committed. The defendant

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was guilty of burglary. (2 *Russell on Crimes*, 38, *Phila. ed.* 1841. 1 *Hale*, 559, 560.) (b.) If he had been indicted for the burglary, he might have been convicted of the larceny only. (*State v. Crocker*, 3 *Harr.* 554. *State v. Brady*, 14 *Verm.* 356. *Jones v. State*, 11 *N. H. Rep.* 269.) And this is upon the ground that if any part of the offense charged be proved, that part being necessarily included in the whole, there may be a conviction of such part as may be proved. In *Haskins v. The People*, (16 *N. Y. Rep.* 348,) Judge Denio says: "Burglary, when accompanied with larceny, is a compound offense. Under a count for the burglary a conviction might be had for simple larceny." (See also *Hale*, p. 559, § 60. 3 *Greenl. Ev.* § 36.) In *Rex v. Butterworth and two others*, (*Russ. & Ry.* 520,) the defendants were indicted for a burglary in breaking into the house of one Keighley, in the night time, and stealing therein to the value of forty shillings and upwards. More (one of the defendants) pleaded guilty of the burglary, the others, not guilty of the whole offense charged, and upon the trial were acquitted of the burglary, and found guilty of stealing only. The seven judges agreed that judgment might be entered against More for burglary and capital larceny, and against the others for larceny alone. So in *Rex v. Comer*, (1 *Leach C. C.* 36,) where the prisoner was indicted for breaking and entering, and stealing, it was held by nine judges unanimously, that where the felony was laid to constitute the burglary, the acquittal of the felony included an acquittal of the burglary also. In *The People v. McGowan*, (17 *Wend.* 386,) the prisoner was first indicted for robbery and stealing a watch, and acquitted. He was afterwards indicted for larceny in stealing the same watch. He pleaded the first trial and acquittal, but the oyer and terminer overruled it, and the prisoner was convicted. Upon the error brought, the Supreme Court say: "The first indictment, though for robbery, involved the question of simple larceny, of which the prisoner might

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have been convicted." The prisoner had, within the issue, been tried "and acquitted of the larceny," and so the conviction was set aside. And conversely, but in harmony with this decision, in the case of *The State v. Lewis* (2 *Hawks*, 98) it was held that a conviction for larceny precluded an indictment for the same taking as a robbery. For, in the last indictment, the defendant is in jeopardy of being again convicted of larceny, if the violence should not be clearly proved. (*State v. Chafflin*, 2 *Swan*, 493. *Commonwealth v. Cunningham*, 13 *Mass. R.* 245. *Commonwealth v. Squire*, 1 *Metc.* 258. 22 *Pick.* 1, 7.) (c.) A former conviction or acquittal of a minor offense (as in this case the larceny) is a bar to a prosecution for the same act charged as a higher crime, (burglary,) whenever the defendant, on trial of the latter, might be legally convicted of the former, had there been no other prosecution. Both burglary and larceny (of goods valued as in this case) are felonies; but burglary is the superior one, and made so, because the larceny enters into and becomes a necessary ingredient of it. In this case the breaking, disconnected with the larceny, would be a mere trespass. Connected with the larceny, the law awards to it the name and penalties of burglary. The whole offense is one, and cannot be subdivided. It will necessarily follow that where part of an offense is passed upon, there can be no second indictment for another part. In civil cases the law abhors a multiplicity of suits, and is yet more watchful in criminal cases—that the citizen shall not be oppressed by unnecessary prosecution. (*Fiddler v. The State*, 7 *Humph.* 508. *State v. Cooper*, 1 *Green*, *N. J.* 31. *State v. Townsend*, 2 *Harr.* 543.) In *The State v. Cooper*, (1 *Green*, *N. J.* 274,) the court say: "If a man breaks the house of A. in the night time, and steal his goods, and upon an indictment for burglary and stealing these goods he be acquitted, it would be a bar to a subsequent prosecution

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for the larceny." So, "if he be indicted for the simple larceny and acquitted, he cannot afterwards be convicted, upon an indictment for the burglary and larceny, of either offense." The same principle applies to a former conviction. "A defendant cannot be convicted and punished for two distinct felonies growing out of the same identical act, when one is a necessary ingredient to the other, and one has been selected and prosecuted to conviction."

"I am satisfied," says the judge who delivered the opinion in the case last cited, "that a conviction of larceny would be a good bar to a prosecution for burglary and stealing the same goods." In *Commonwealth v. Pike*, (3 *Cush.* 181,) the defendant was held to have no just ground of objection to a conviction upon an indictment for manslaughter, because the facts proved he had been guilty of murder. In *Commonwealth v. Burke*, (14 *Gray*, 100,) it was decided that evidence of an assault with a weapon dangerous to life would support a complaint for a simple assault, although the complaint alleged that it was not committed with a weapon dangerous to life. In *Commonwealth v. Squire*, (1 *Metc.* 264,) it was held that in the case of larcenies it would be no defense to an indictment to show that the defendant committed the offense charged, but with certain aggravating circumstances not charged. In *The People v. Durkin*, (5 *Park. Crim. Rep.* 250,) the court say, "no doubt a person may be indicted and convicted of larceny, although the facts prove a burglary." 3. If the defendant should be indicted for the burglary, and the offense did not appear from the record to be identical with the one for which he has been convicted, parol evidence would be admissible to establish that fact. (*The People v. McGowen*, 17 *Wend.* 386. 3 *Greenl. Ev.* § 36.)

II. A new trial should be denied, and proceedings remitted to the Wayne county sessions for judgment upon the conviction.

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J. Welling, for the defendant.

I. The motion to discharge the prisoner, when the people rested, should have been granted. 1st. Every indictment must contain a description of the crime of which the defendant is accused, and a *statement of the facts* by which it is constituted, so as to identify the accusation, lest the grand jury should find *a bill for one offense* and the party be put on his trial for another without any authority. (*Lambert v. The People*, 9 Cowen, 586, 591, 2. *Dedieu v. The People*, 22 N. Y. Rep. 180, 185. *The People v. Taylor*, 3 Denio, 91.) 2d. "These precautions are also necessary in order that the defendant may know what crime he is called upon to answer; * * * they are also important in order that the defendant's conviction or acquittal may insure his subsequent protection, should he again be questioned on the same ground, and that he may be enabled to plead his conviction or acquittal of the same offense in bar of any subsequent proceedings." (1 *Chit. Crim. Law*. 169. *Dedieu v. The People*, 22 N. Y. Rep. 180, 185. *The People v. Taylor*, 3 Denio, 91.) 3d. "The definition of burglary, at common law, was the breaking and entering the house of another with intent to commit some felony therein. The Revised Statutes have substituted a definition of the crime, as a breaking and entering a dwelling, &c., with intent to commit some crime therein. The Revised Statutes do not, however, by this section, create a new offense." (*Mason v. The People*, 26 N. Y. Rep. 201.) 4th. The larceny was a constituent of, and merged in, the burglary. "A contrivance to commit a felony, and executing the contrivance, cannot be punished as an offense distinct from the felony, because the contrivance is a part of the felony, when committed pursuant to it." "Merger, which exists when two offenses of different degrees have been committed at the same instant, and in prosecution of the same object." (*Opinion of J. C. Spencer, senator, in Lambert v. The People*, 9 Cowen, 594.

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Dedieu v. The People, 22 N. Y. Rep. 184, 185.) "If the defendant be indicted for a burglarious entry and stealing, and acquitted, he may still be tried for a burglarious entry with intent to steal; for although the burglary be the same, it is evident the prisoner could not have been found guilty on the first, upon proof of a mere intention; and, therefore, may well be indicted for that offense in the second." (1 Chit. Crim. Law, 456, citing 2 Leach, 716; Hawk, b. 2, ch. 35, § 5; 2 Leach, 816; 12 Peck. 503.) 5th. The indictment and conviction in the court below is no bar to an indictment and conviction of the defendant for the burglary proved on the trial. "It is, indeed, generally laid down that an acquittal of burglary will not prejudice an indictment for larceny, or vice versa." (1 Chit. Crim. Law, 457, citing note m; 2 Hale, 245, 6; Hawk, b. 2, ch. 35, § 5; 22 N. Y. Rep. 182, 4, 5.) "In order, however, to entitle the defendant to this plea, *autre fois acquit*, it is necessary that the crime charged be precisely the same." (1 Chit. Crim. Law, 452.) "It is to be observed that the pleas of *autre fois acquit*, and *autre fois convict*, or a former acquittal and former conviction, must be upon a prosecution for the same identical act and crime." (4 Black. Com. 376.)

II. The motion for the discharge of the prisoner, when the evidence closed, should have been granted. (*Authorities under 1st point*, and 22 N. Y. Rep. 186, 188.)

III. The testimony offered by the defendant, by the witnesses Frederick Clark and Charles Purdy, should have been received.

IV. The defendant's exception to the charge of the court is well taken. (*See authorities under points 1 and 2.*)

V. The conviction should be reversed.

By the Court, JOHNSON, P. J. The motion made by the defendant's counsel, when the people rested, and renewed at the close of the testimony in the case, was properly denied, in each case. The substantial ground of the ob-

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jection on each occasion was, that if the defendant was guilty of the larceny charged in the indictment, it was committed in connection with a burglary in which the larceny was merged, and that in such a case, there could be no indictment and conviction for the larceny as a separate and distinct offense. But there is no such rule. There is no merger, in such a case, which is available to the accused by way of defense, until there has been a trial and conviction for the greater offense. Burglary and larceny, charged in the same indictment as having been committed on the same occasion, is a compound offense, and upon the trial the party accused may be convicted of either one, without the other. Until the verdict and judgment, it can never be known, with certainty, whether the accused is guilty of either, much less of both. But until after conviction there can be no such thing as a merger which constitutes a defense; especially where each ingredient of the compound is a felony. But where there has, in a case of that kind, been a conviction for the burglary, a plea of *autre fois convict* would be a good answer and defense to a subsequent indictment for the larceny which was committed at the same time and by means of the burglary. It is all the same felony, and the lesser is merged and satisfied in the conviction and punishment of the greater. It is then established by the verity of the record, that the accused is guilty of the burglary and has suffered the penalty therefor. The plea to the subsequent indictment for the larceny, of *autre fois convict*, admits of record the truth of the charge of larceny contained in the indictment, and tenders the issue that it is part of the same felony of which the defendant has once been convicted, on the trial of the indictment for burglary. (*Arch. Cr. Pl.* 88. *The People v. McGowan*, 17 *Wend.* 386.) It may well be, that the defendant here, as the motion and the argument in his behalf seem to admit, ought to have been indicted and convicted of the burglary instead of the larceny. But it is plain

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enough that the mere fact that he has not been so convicted, is no answer or defense to the larceny separately charged, and established to the satisfaction of the jury by the evidence. It would be a most dangerous doctrine to establish, that a defendant indicted for a felony may defend himself successfully and procure his acquittal by proving that he had at the same time committed a higher crime, which constituted a part of the same felony with that of which he stood charged by the indictment.

There can be no doubt, I apprehend, that where a person has been guilty of a burglary and a larceny at the same time, he may be indicted for either the burglary or the larceny, separately, and convicted of the offense charged. Whether, after having been indicted for one of such offenses only, and convicted upon that one, he could afterwards be indicted separately and convicted for the other, is quite another and different question, and one which could not legitimately arise until the second indictment. It is laid down, in some of the older authorities, that an acquittal, upon an indictment for a burglary, with intent to commit a larceny, but which does not charge the commission of a larceny, is no bar to a subsequent indictment for the larceny. The reason given is, that the defendant could not have been convicted of the larceny on the first indictment, inasmuch as it was not charged. (*Arch. Cr. Pl.* 88. 2 *Hale*, 245. *Rex v. Vandercourt*, 2 *Leach*, 716.) But if the first indictment, for the burglary, charges the commission of the larceny also, so that the defendant may be convicted of the larceny if the proof of the burglary is insufficient to establish that offense, but proves the other, the reason of the rule fails, and the rule with it. The acquittal would then be a bar to the subsequent indictment for the larceny.

But whatever may be the rule in regard to acquittals, there cannot, I apprehend, be two convictions, for separate acts, constituting the same felony. If it is all the same

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felony, one conviction is a bar to any other, for the offense, of whatever degree. Thus in *Wrote v. Wigges*, (4 Co. R. 403,) it was resolved that a conviction for manslaughter was a bar to a subsequent indictment for the murder of the same person; and in that case it is said that "it was resolved without difficulty in *Holtroft's* case, that if a man commits murder, and is indicted and convicted, or acquitted of manslaughter, he shall never answer to any indictment for the same death, for all is one and the same felony, for one and the same death, although murder is, in respect of the circumstance of the forethought of malice, more odious."

It was upon this principle that it was held in the case of *The State v. Lewis*, (2 Hawks, 98,) that a conviction for larceny was a bar to a subsequent indictment for the robbery which accompanied the larceny, and which was part of the same felony.

I am of the opinion, therefore, that the conviction for the larceny which was committed by means of the burglary, will constitute a bar to any subsequent trial and conviction of the defendant for the offense of burglary. It was all one transaction, and constituted but one felony, though a compound one.

There is no ground, however, in this case, for any presumption that the defendant will ever be called upon to answer any indictment for burglary. He was a witness in his own behalf, upon the trial, and testified to his entire innocence both of the larceny and burglary. And had he been indicted for the burglary and larceny, it is by no means certain in view of the character of the people's principal witness, and of all the testimony together, that he would have been convicted of the burglary. He may be guilty of that, and may not be. But whether he was or was not, he was not entitled to be discharged, because it appeared on the trial that he probably was guilty of the higher offense also. There was no variance between the indict-

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ment and the proof. The indictment was for larceny, and the proof tended strongly to establish it.

The exception to that part of the charge, set out in the case, is not well taken. It is a mere general exception, without specifying any grounds of error. Such an exception is of no avail. There was no request to charge otherwise in any particular.

The conviction must therefore be affirmed, and the proceedings remitted to the court of sessions of Wayne county for judgment and sentence upon the conviction.

[MONROE GENERAL TERM, March 7, 1870. *Johnson, J. C. Smith and Dwight, Justices.*]

MARY J. RAINSFORD vs. GEORGE C. RAINSFORD.

When one partner becomes liable to his copartner, in an action at law, for the portion of partnership funds in his hands belonging to such copartner, the form of such action is properly for money had and received by the defendant to the use of the plaintiff.

The cases in this State are quite uniform in holding that there must be not only a settlement, but an express promise to pay, before an action at law by one partner, to recover his share of the partnership moneys, against another partner, can be maintained.

Where a verdict is according to the very right of the case, upon the facts found, the judgment will not be disturbed on any question of form, when there is no exception involving any error in matter of law.

Where an action was tried wholly upon the issue whether the plaintiff, or her husband, was the defendant's partner in business, and the judge charged the jury that the plaintiff was entitled to recover her share of the assets, as ascertained by a settlement and balance struck, if she was the partner of the defendant; *Held* that the defendant having taken no exception to the charge, he must be deemed to have acquiesced in that view of the case, and could not object or except on appeal.

THE plaintiff obtained a verdict in this action, at the Ontario circuit, for \$553.22. The defendant moved, at the same circuit, for a new trial, on the judge's minutes.

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which motion was denied. Afterwards, on the 19th day of February, 1869, judgment was entered upon the verdict, in favor of the plaintiff. The defendant appealed, to the general term, from the order denying a new trial upon the judge's minutes, and from the judgment.

This action was commenced by the service of a "summons for money." The complaint was for "money had and received by the defendant to the use of the plaintiff." The amount claimed was \$507. The answer was a general denial. On these pleadings the cause was tried.

The plaintiff's counsel, in opening the case to the court and jury, stated, in substance, that the facts on which the plaintiff relied to establish a cause of action were as follows: 1. That the plaintiff is a married woman. 2. That she possessed an estate of her own, separate from her husband. 3. That the plaintiff as such married woman, and having such separate estate, entered into copartnership with the defendant, in the purchase of hogs, to be shipped to eastern markets and sold. 4. That hogs were purchased by the firm, and shipped to Albany and sold. 5. That the defendant received the proceeds of the sale. 6. That an accounting was had, and including the capital put in by the plaintiff, and her share of the profits, her share amounted to \$507. 7. That the defendant refused to pay it, and this action is brought to recover that sum. The defendant moved for a nonsuit, on the opening, on the ground that no such cause of action was stated in the complaint. The court denied the motion, and the defendant excepted. The plaintiff then gave evidence tending to establish the facts above stated, or some of them, showing a variety of partnership transactions, not limited to the hog speculation. That on a settlement of the hog copartnership, according to the plaintiff's version of it, there had been made \$84 profit, and the plaintiff's share of the copartnership assets was \$507. That sum was demanded, and the defendant refused to pay. This evidence

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was all taken under the objection of the defendant's counsel. At the conclusion of the plaintiff's evidence the defendant moved for a nonsuit. The motion was denied, and the defendant excepted. The defendant then gave some evidence controverting the claim that the plaintiff had a separate estate; denying the copartnership with her; denying that any accounting was had, or any balance due her. The defendant testified that the transaction in question was between him and the husband of the plaintiff. He denied that \$507 was ever found to be due either to the plaintiff or her husband. At the conclusion of the evidence the defendant renewed his motion for nonsuit, which was denied, and the defendant excepted.

It appeared by the evidence, that the plaintiff's husband made an assignment for the benefit of his creditors, March 24, 1866. That soon after the assignment the plaintiff commenced to do the same business in which her husband was engaged before the assignment. The defendant offered to show that this assignment was made to cheat and defraud creditors. The court excluded the evidence, and the defendant excepted. The defendant offered to show that the farm in question, which the plaintiff claimed as her separate property, was in fact the property of her husband; that all the property the plaintiff claims as her separate estate was the property of David A. Rainsford, and that the money David A. Rainsford put into this hog copartnership was his own, and not his wife's; that the only pretense his wife had to claim it was under fraudulent conveyances from her husband. The court excluded the evidence, and the defendant excepted.

J. Van Voorhis, for the appellant.

I. This action cannot be sustained, upon the complaint. The plaintiff could, with much more reason, put in evidence the defendant's promissory note, to sustain a complaint for money had and received. Copartners are equal owners of

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the copartnership property. One partner cannot be said to have received partnership funds "to or for the use of his copartner." Suppose there had been six copartners instead of two. Then, if this action can be sustained, an action for money had and received could be sustained by each of the firm, to recover his proportion of the partnership estate. The Code (§ 142) requires the complaint to state the facts which constitute the cause of action. Here not one of the facts constituting the cause of action is found in the complaint. "Facts constituting a cause of action," mean all those facts which are traversable, and which are to be established by evidence. (*Wooden v. Strew*, 10 *How. Pr.* 48. *Lawrence v. Wright*, 2 *Duer*, 674. *Mann v. Morewood*, 5 *Sandf.* 566.) The facts that the plaintiff is a married woman, and has a separate estate, are essential and traversable facts, without proving which, this action must fail. So, also, are the facts that the copartnership was entered into, the parties agreeing to share equally the profits and losses; that business was done by the copartnership; that the proceeds of the sale of copartnership property came into the hands of the defendant. In this State, no action will lie between copartners for a balance of account, except there be an express promise to pay. (*Casey v. Brush*, 2 *Caines*, 293. *Halstead v. Schmelzel*, 17 *John.* 80. *Westerlo v. Evertson*, 1 *Wend.* 532. *Townsend v. Goewey*, 19 *id.* 424. *Pattison v. Blanchard*, 6 *Barb.* 537. *Same v. Same*, 1 *Seld.* 186. *Murray v. Bogert*, 14 *John.* 318. *Clark v. Dibble*, 16 *Wend.* 601. *Koehler v. Brown*, 31 *How.* 235. *Pars. on Copartnership*, 278, 280, *n. c.*) Here is not only no promise, but an absolute refusal. In case of a refusal no promise can be implied. "The ground of a legal implication is that the parties to the contract would have expressed that which the law implies, had they thought of it, or had they not supposed it was unnecessary to speak of it because the law provides for it." (2 *Pars. on Cont.* 27, and cases cited on p. 28, *n. b.*) But when attention is

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called to the matter, and the defendant refuses to pay, there can be no such thing as an implied promise. A promise and a refusal of the same thing are impossible. The complaint does not allege any promise, and not even a demand and refusal. This copartnership was not intended to terminate with this one shipment. David A. Rainsford evidently contemplated a continuance beyond that transaction. No limit was set to the copartnership. It terminated only by the commencement of this suit. It is submitted that no authority can be found for maintaining this action for money had and received between copartners for a balance claimed to be due one of them on settlement. (3 *Comst.* 173. 50 *Barb.* 385.)

II. The court erred in refusing to allow the defendant to show that the plaintiff had no separate estate, and in excluding the evidence offered. If the facts were so, she could not maintain the action. The plaintiff had given evidence to show that she had separate property. The defendant had a right to countervail that evidence. The defendant called the husband of the plaintiff, and was proceeding to show that all the property claimed by the plaintiff as a separate property, was in fact her husband's, and that she had no separate estate. That the assignment and deeds under which she obtained the money she put into this transaction, and which she claimed as her separate estate, were void for fraud, and were made to cheat and defraud her husband's creditors. This the court excluded. And yet the learned judge charged the jury that if they found that the business was done in the plaintiff's name as a cover; if the property belonged in fact to the husband, and not to the wife, and she had no separate estate, the defendant must recover, and charged the jury that they might so find from the evidence. And yet, by a seeming inconsistency, he excluded all the evidence of the defendant on that subject, except what was elicited from the plaintiff and her husband, on cross-examination. If the

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plaintiff's husband had made a fraudulent assignment, and by means of it put his property into his wife's hands, it was competent to prove it. That is not such a separate estate as would entitle her to maintain this action. If, just before he made this assignment, he had made a fraudulent conveyance to his wife of the farm on which the wheat was raised that produced the first \$1000 of her capital, it was competent to show it. Assuming it to be established, nothing is clearer than that this \$1000 was the husband's money, and not the wife's. Being his money, the defendant had a right to set off against it an equal amount of David's indebtedness to him. This he did. The indebtedness of David A. Rainsford to the defendant is \$1000 or \$1200. (*Abbey v. Deyo*, 44 Barb. 374. *Knapp v. Smith*, 27 N. Y. Rep. 277. *Gage v. Dauchy*, 34 id. 293. 1 *Keyes*, 29. 3 id. 329.)

III. Whenever the title to property is in question, and that title is derived through conveyances made to cheat and defraud creditors, the fraud may be shown. (*Nichols v. McEwen*, 17 N. Y. Rep. 22. *Edgell v. Hart*, 5 Seld. 213. *Pine v. Rikert*, 21 Barb. 469. 19 id. 450. 18 id. 272. 6 *Hill*, 438. 4 *Denio*, 171, 217.)

H. O. Chesebro, for the respondent.

I. There was but one issue in this case, which was submitted to the jury as a question of fact, to wit: Was the plaintiff the real party interested in the transaction in respect to the hogs bought and shipped, or was her husband the party? Upon this issue the evidence was conflicting. It was the only question litigated, and was fairly submitted to the jury, and the plaintiff had a verdict. There was no dispute, on the trial, as to the amount, it being conceded that if the plaintiff was entitled to recover, she should recover the amount for which the verdict was rendered. The charge of the judge submitted this question to the jury with great fairness, certainly with no lean-

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ing to the plaintiff. This court will not disturb such a verdict unless some error was committed on the trial in the admission or rejection of evidence.

II. No error was committed on the trial in the admission or rejection of evidence. 1. The objection that no such cause of action was set up in the complaint as the counsel, in his opening, had stated the plaintiff expected to prove, was not well taken. The opening stated only a single transaction of the parties, plaintiff and defendant, the profit of which was received by the defendant. The whole matter of money advanced and profit was footed up, and a balance struck, which showed the defendant had in his hands \$507 belonging to the plaintiff. An action for money had and received was therefore a proper form of action. (*Harpending v. Shoemaker*, 37 Barb. 270, 296.) But such an objection is of no avail now. (1 Chit. Pl. 309.) The cause was tried on the merits, and all the facts shown. Whatever may have been the form of the action, the verdict would not be disturbed. If necessary, the court would regard the pleadings amended so as to conform to the facts proved. (21 N. Y. Rep. 305.) 2. The motion for a nonsuit was properly denied. The testimony of the defendant showed that he had \$507 in his hands which belonged either to the plaintiff or her husband, and the verdict determined that it belonged to the plaintiff. The defendant was therefore liable for money had and received. 3. The evidence of the assignment of D. A. Rainsford, dated March 24, 1866, recorded in Ontario county March 26, 1866, and certain deeds executed by him, offered for the purpose of showing that they were made to cheat and defraud his creditors, and also to prove that the money which the plaintiff put into this venture was obtained by her through these fraudulent conveyances, was inadmissible, and the several exceptions to the ruling rejecting the evidence as incompetent and immaterial, were not well taken. It was immaterial what the intention of D. A.

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Rainsford was in regard to his creditors, or whether he had made an assignment to defraud them, or where the plaintiff obtained the money she put into this venture with the defendant. A man cannot obtain the possession of another's money, and when called to account for it, set up that it was stolen, or that it was procured through a fraud on third parties. The defendant was not in a position to raise the question, and if all the defendant claimed was true, it could not affect the issue in this action. 4. A reference to the charge will show that this case was carefully and fairly submitted to the jury. Great latitude was allowed, on the trial, to the defendant to impeach the fairness and honesty of the transaction on the part of the plaintiff, and the plaintiff had a verdict because the weight of evidence was decidedly in her favor.

By the Court, JOHNSON, P. J. The only question of fact tried, and submitted to the jury was, whether the plaintiff or her husband was the partner of the defendant, in the transaction out of which the money sought to be recovered, arose. There was no dispute as to the amount to which the defendant's partner, whichever one it was, ought to have from the defendant. The money was all in the defendant's hands, the account had been settled and adjusted, and the respective proportions of each partner ascertained and agreed upon. The jury found, upon the evidence before them, that the plaintiff was the partner in the transaction with the defendant, and in this they were fully warranted by the evidence. It is claimed on the part of the defendant, that even if the parties were partners, this action cannot be maintained on the complaint, which is for money had and received by the defendant to the plaintiff's use, only. The objection to the form of the action is not well taken. When one partner becomes liable to his copartner, in an action at law, for the portion of part-

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nership funds in his hands, belonging to such copartner, the form of such action is properly for money had and received by the defendant to the use of the copartner. (*Coffee v. Brian*, 3 Bing. 54. *Brierly v. Cripps*, 7 Car. & Payne, 709.) In both these cases, it was held that this action could be maintained between partners, when the partnership had been closed, and the balance struck, as was the fact here.

The cases in this State are quite uniform in holding that there must be not only a settlement, but an express promise to pay, before an action at law, by one partner, to recover his share of the partnership moneys, against another partner, can be maintained.

But this question of the necessity of an express promise does not seem to have been raised by the defendant, in any part of the case. In the motion for the nonsuit, the ground was merely general, that the proof failed to establish the cause of action set forth in the complaint. In what particular there was such failure of proof, was not pointed out or suggested. There was no exception to the charge of the judge, and no request to charge differently, in any respect, from what he did charge. The charge was that the plaintiff was entitled to recover her share, as ascertained by the settlement, and balance struck, if she was the partner of the defendant in the transactions by which the money was produced. The case seems to have been tried wholly upon the issue whether the plaintiff, or her husband, was the defendant's partner in the business. As the defendant's counsel took no exception to the charge, he must be deemed to have acquiesced in that view of the case, and cannot object or except now.' Had he raised the precise question then, or at any other stage of the trial, the charge might have been different, or other evidence on the subject of an express promise might have been given. At all events, the question would then have been

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distinctly presented, which the defendant's counsel seeks to raise now upon the argument, whether an express promise is necessary in order to maintain an action for money had and received, between partners, in a case like this, where the partnership has been terminated, and the account has been settled, and the balance belonging to each partner struck. But that question was not presented upon the trial, or considered. As the verdict of the jury was according to the very right of the case, upon the facts found, the judgment will not be disturbed on any question of form, when there is no exception involving any error in matter of law.

The evidence offered by the defendant in relation to the fraudulent assignment by the plaintiff's husband, was properly excluded. It was wholly irrelevant. The defendant was in no situation to litigate that question in this action. It was of no sort of consequence how the plaintiff obtained her share of the funds, which went into, and constituted part of, the bulk of the partnership funds, if she did not obtain it from the plaintiff.

The verdict and judgment are right, and the judgment should be affirmed.

[MONROE GENERAL TERM, March 7, 1870. *Johnson*, P. J., and *Dwight* and *B. Darwin Smith*, Justices.]

ACER *vs.* THE MERCHANTS' INSURANCE COMPANY, of
Hartford.

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66h 317

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A party holding a contract for the purchase of premises from the owner, on which he has made payments, has an insurable interest in the premises.

And although a third person, to whom such party has contracted to sell the premises, has without his consent, obtained a conveyance from the owner, this will not affect such party's rights. Such third person, having full knowledge of those rights, will hold the title subject thereto.

Such party still has the equitable title, until his rights are adjusted. His right is not a conditional right, but an absolute right, to the extent of his ownership, or equitable title. He is therefore not guilty of any fraud which will vitiate a contract of insurance, in representing himself as the owner of the property.

A policy of insurance, issued to the plaintiff by the defendant, contained this condition: "If the assured, or any other person or parties *interested* shall have existing, during the continuance of this policy, any other contract or agreement for insurance, (whether valid or not,) against loss or damage by fire, on the property hereby insured, not consented to by this company," &c., "then this insurance shall be void and of no effect," &c. *Held* that the "other persons or parties interested," specified in the condition, referred to parties interested in the plaintiff's *insurance*, merely; and that it was not the understanding or intention that any other person who might have a separate interest in the *property*, and not connected in interest with the plaintiff, and having no interest in his insurance, might avoid the plaintiff's contract by obtaining an insurance of his own interest in the property, without the plaintiff's knowledge or consent.

THIS was a controversy submitted to the court without action, under section 372 of the Code of Procedure, upon a case agreed on by the parties, containing the following facts:

The defendant is a fire insurance company, duly incorporated, and doing business in the State of New York, by virtue of the laws thereof. On the 24th day of April, 1867, the plaintiff was in possession of two certain parcels of land, situate in Rochester, (particularly described,) being the same lands described in the contract of the plaintiff with Geo. G. Curtiss, annexed to the case, marked "A." He held possession of the first described piece of land under a contract from Charlotte H. Brown, executrix, who

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held the title, for the sale and purchase thereof, which contract was annexed, marked "B," and upon which the several payments had been made by the plaintiff as they became due. The buildings and the machinery on the premises described in the contract marked "B," and which were worth several thousand dollars, had been erected and placed thereon by the plaintiff since its purchase by him. He held the legal title to the second described piece of land, and the dwelling thereon, which he had never conveyed. On said 24th day of April, 1867, the plaintiff entered into a contract of sale of said premises with Geo. G. Curtiss, a copy of which was annexed, marked "A," and on the same day, the said Curtiss entered into the use and possession of the premises, and has continued the same to the present time.

The plaintiff, on the day last aforesaid, received a deed from Curtiss of the property by said contract to be conveyed to him, and entered into, has since been, and now is in possession thereof.

There was a part of a lot next adjoining the Magne street property, which Curtiss was desirous of obtaining, and which still belonged to Mrs. Brown as executrix, and in reference to the sale of which the said Acer and Mrs. Brown had had some negotiations, and after making the aforesaid contract, marked "A," Acer and Curtiss went together to DeLancey Crittenden, Esq., and he was requested to correspond with Mrs. Brown, who was then at Brooklyn, N. Y., on the subject, and to ascertain whether or not the deed to be given by Mrs. Brown under her contract with Acer might not run directly to Curtiss instead of Acer, and the bond and mortgage to be given back under the contract, be given by Curtiss instead of Acer. The result of this correspondence and negotiation with Mrs. Brown was, that she agreed to sell to Curtiss the above mentioned adjoining parcel for \$325, and to include that with the land mentioned in the contract with Acer in

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a deed running directly to Curtiss, and a deed was accordingly made out, dated the 3d day of June, 1867, running from Mrs. Brown, as executrix, to Mr. Curtiss, reciting a consideration of \$1550, and conveying to Curtiss the land included in her contract with Acer and the above mentioned additional parcel, which deed, acknowledged by Mrs. Brown, was left in the hands of her agent, DeLancey Crittenden, and a copy of which was annexed to the case, marked "C."

On the 5th day of June, Curtiss, without the knowledge or consent of Acer, called on Crittenden and requested of him the delivery of the deed to him, (Curtiss;) and in response to Mr. Crittenden's inquiry, as to whether he (Crittenden) was authorized to make such delivery under the agreement between Curtiss and Acer, was assured by Curtiss that it was all right, and Mr. Crittenden thereupon delivered the deed to Curtiss without any previous direction from Mr. Acer to make such delivery, receiving from Curtiss \$600 of the consideration, and taking Curtiss' bond and mortgage for the balance unpaid, being \$281.50, and which included the purchase price of the aforesaid additional lot; and Curtiss, on the same day, to wit, the 5th day of June, 1867, caused said deed to be recorded in the office of the clerk of Monroe county, and without executing to the plaintiff the mortgage of \$3380.20, executed and delivered to one Daniel P. Westcott a mortgage upon the lands included in this deed, conditioned as security for \$6000, which was made up of a present consideration of money and securities of \$1750, and a precedent debt from Curtiss to Westcott of the balance of \$6000, a part of said present consideration being used by Curtiss to pay upon the purchase price to Mrs. Brown of \$550. That said response aforesaid, that it was all right, made by Curtiss to Crittenden, was false, and said deed was thereby obtained by said Curtiss from Crittenden with the intent on the part of said Curtiss to execute said \$6000 mortgage to

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Wescott, prior to giving the mortgage to the plaintiff, as provided in his said contract with the plaintiff. * * *

Sometime in the month of December, A. D., 1867, the plaintiff, having learned of the delivery of the deed to Curtiss, and of the mortgage to Wescott, tendered to Curtiss a deed of the second described piece of land to him, and demanded of him a mortgage of all the premises, as required by the contract marked "A." Curtiss was willing to give a mortgage to the plaintiff, which would be a subsequent lien to the Wescott mortgage, but the plaintiff would not accept, demanding one prior, in point of lien, to the Wescott mortgage, and claiming that the delivery of the deed by Crittenden to Curtiss was unauthorized, and a fraud upon his rights. The plaintiff, Acer, thereupon commenced an action in the Supreme Court against the defendant, Curtiss, and Daniel P. Wescott, upon a complaint alleging the foregoing facts, and that the delivery of said deed to Curtiss, by Crittenden, was fraudulent and unauthorized, and stating that he did not know of the fraudulent delivery of said deed, made and executed by the said Charlotte H. Brown, and so delivered by Crittenden, her attorney, to Curtiss, nor the making, executing or delivery of said mortgage to Wescott, until on or about the 5th day of December, 1867, and that he had thereupon immediately given notice to Wescott of his rights in the premises, and demanded of Curtiss the fulfillment of his said contract, and also that he had given notice to Wescott that the deed from Mrs. Brown to Curtiss, so far as the premises described in contract marked "A" was concerned, was fraudulently obtained, and that there had never been an absolute delivery thereof to Curtiss, and also alleging that Curtiss was in embarrassed circumstances, and that the plaintiff had no adequate remedy at law, and that unless the relief demanded in the complaint was granted, the plaintiff would be in great

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danger of losing and being defrauded out of a large portion of the purchase money of said premises; and the complaint asked that the said mortgage, given by George G. Curtiss and Debby A., his wife, to Daniel P. Wescott, be set aside, canceled and declared fraudulent and void, as regards this plaintiff, so far as the premises on Magne street, first described in contract marked "A," are concerned and affected thereby; that said Wescott be ordered and directed to execute and put upon the records of Monroe county clerk's office, a release, or full satisfaction of said mortgage, so far as said premises were affected thereby, duly executed and acknowledged, and that this court order, decree and direct, that the deed from said Charlotte H. Brown, executrix, &c., so far as the last aforesaid premises were concerned and affected thereby, be set aside, canceled and declared null and void, and canceled of record, and that the said Charlotte be ordered and directed to deed said premises to the plaintiff, subject to her mortgage of \$281.50, given by Curtiss thereon, unless Curtiss should make, execute and deliver a good and sufficient mortgage of \$3380.20 upon said premises, the lien thereof second only to the lien of said mortgage of \$281.50, and comply in every respect with the terms and agreements of said parties. That said court order and decree a specific performance of said contract on the part of said Curtiss and said Charlotte, or that she make, execute and acknowledge a new deed to Curtiss, and deliver it to Acer, and for such other relief as to the court might seem meet and proper in the premises.

The complaint and *lis pendens* in that action were filed in Monroe county clerk's office, and the former was sworn to on the 28th day of January, 1868, but after the plaintiff had obtained the policies of insurance hereinafter set forth; and the summons therein was served by a private person, other than the sheriff or his deputy, on Curtiss and his wife, and Daniel P. Wescott, on the 4th day of

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February, 1868. In that action a judgment was recovered February 3d, 1869, in favor of the plaintiff and against the defendants Curtiss and Wescott, whereby the plaintiff was adjudged to have a lien upon the property included in contract marked "A," for the payment of said sum of \$3380.20 prior to the lien of said Wescott, and that the said mortgage to the defendant Westcott is subordinate to such lien, &c. From this judgment the defendant Curtiss did not appeal.

On the 28th day of January, 1868, but before the commencement of said action, the plaintiff applied to Messrs. McLean & Johnson, agents for the defendants at Rochester, for insurance on the above described premises, informed them that he was the owner thereof, that he had sold the same to Curtiss, and showed the contract marked "A" to said agents, and informed them that Curtiss had neglected to insure the property as he had agreed to do by that contract, because, as he stated, Curtiss said the insurance companies charged such high rates for insuring it, and he, the plaintiff, thought it ought to be insured. The said agents thereupon executed and delivered to the plaintiff a policy of insurance of the defendant, insuring said property to the amount of \$1000, for the term of one year from said January 28th, 1868, and at the same time issued two other policies on the same property, for the same amount and time; one in the Tradesmen's Insurance Company of New York, and one in the Narragansett Insurance Company of Providence, Rhode Island, and the plaintiff paid them therefor.

On the — day of June, 1868, Curtiss applied to Messrs. Buell and Brewster, insurance agents at Rochester, for insurance upon said property, informed them of the insurance made by the plaintiff, and took out other insurances thereon to the amount of \$4200, in different companies represented by them, viz: \$1050 each in the Putnam Insurance Company of Hartford, Norwich Insur-

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ance Company of Norwich, Conn., and the Mutual Insurance Company and Western Insurance Company of Buffalo, New York. The plaintiff had no knowledge of this insurance until after the fire. A fire occurred on the 21st day of August, 1868, by which loss and damage was sustained to the property insured, to the amount of \$3657.70, which amount, except that occurring on the dwelling, had been paid to Curtiss by the companies so insuring him. Notice of the fire and proofs of loss were duly given to the defendant, as required by the conditions of their policy. No part of the loss had been paid to the plaintiff. The plaintiff claimed to recover of the defendant, as follows :

\$68.24 on frame dwelling-house.

318.05 on brick and frame building.

466.66 on engine, boiler, machinery, fixtures, shafting, belting and pulleys, making in all \$852.95, with interest from the 1st day of February, 1869.

The defendant denied all liability to the plaintiff, but admitted that if liable, the plaintiff was entitled to the above sum.

The question was, whether, upon the above facts, the defendant was liable.

W. F. Cogswell, for the plaintiff.

I. A purchaser, under contract, of real estate that is the subject of insurance, has an "absolute interest"—a perfect title to the insured property, within the meaning of the following provision of the policy: "Any interest in property insured not absolute, or that is less than a perfect title, or if a building is insured that is on leased ground, the same must be specifically represented to the company, and expressed in this policy in writing; otherwise the insurance will be void." The material thing for the parties contracting to know, is the interest at stake in

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the property, and whether it is the same interest in kind as that insured; not whether the interest is created by a particular form of writing, with a seal, and called a deed, or a little different form, and called a covenant, and without the little adhesive plaster, and called a contract. The title of that person to property is not less than absolute and perfect, whose loss will be complete by its entire destruction; no matter what the precise form of the instrument by which his right is created. But this question is too well settled by authority to make *a priori* discussion profitable. (*Hough v. City Fire Ins. Co.*, 29 Conn. Rep. 10. *Chase v. Hamilton Mu. Ins. Co.*, 22 Barb. 527. *Reynolds v. State Mu. Ins. Co.*, 2 Grant's Penn. Rep. 326. *Hope Mu. Ins. Co. v. Brolarky*, 35 Penn. Rep. 282. *Tyler v. Ætna Ins. Co.*, 12 Wend. 507. S. C., 16 Wend. 385.)

II. The policy is not void by reason of the clause forbidding other insurance without notice to the company, usually known as double insurance. 1. It has been held in some, and assumed in a multitude of cases, that when the language is general, as that notice of all previous insurance must be given, &c., under penalty of forfeiture, the claim relates only to other insurance upon the same insurable interest, either in the name of the owner of that interest, or of some one for his benefit. (*Mutual Ins. Co. v. Hone*, 2 Comst. 235. *Ætna Ins. Co. v. Tyler*, 16 Wend. 385.) The language of this clause expresses precisely what was implied by the court, from the general language. "If the assured, or any other person or parties interested, shall have existing, during the continuance of this policy, any other contract or agreement for insurance (whether valid or not) against loss or damage by fire, on the property hereby insured, or any part thereof, not consented to by this company in writing, and mentioned in or indorsed upon this policy, then this insurance shall be void and of no effect; and, if consent be indorsed thereon, the assured shall not be entitled to demand or recover of this

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company any greater portion of loss or damage sustained than the amount hereby insured shall bear to the whole amount of such contracts or agreements for insurance, whether valid or not, or made prior or subsequent to the date of this policy, whether such insurance be by special or by general or floating policies." Interested in what? We answer, in the insurance. Not interested in the property. The latter construction is not the grammatical one. The word interested is in relation to the word assured, and cannot, without violence to the grammar of the sentence, be made to relate to the word property. 2. But the construction claimed would do even greater violence to the true meaning and spirit of the sentence than its grammar. That spirit and meaning is, that if the assured, or any person or party interested with the assured in the subject matter of the insurance, has, &c., then the insured shall be obliged to give notice. Such a requirement is natural and reasonable, since the assured may be presumed to know those things done in his interest, by those associated with him in interest, but not those done by strangers, and with which he has nothing to do. 3. This construction is also fortified by the latter part of the proviso in question, beginning, "and if consent be indorsed," &c., which, although very awkwardly worded, by omitting one term of the proportion, was doubtless intended to create what is called a case of pro rata insurance, but which can never exist when the assured interest is not the same. That is, an insurance upon a mortgaged interest is not pro rated with an insurance effected by a judgment creditor, or the owner in fee. They are entirely different interests, and the loss and damage which each sustains is a different loss or damage, in the language of insurance law. 4. If we are wrong in our construction of this, then the plaintiff was not bound to give notice of the other insurance until he knew of the same himself. It is admitted that he did not learn of such other insurance until after the fire.

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5. The construction understood to be put upon this provision would create such a condition as would be void as unreasonable and unjust.

Geo. F. Danforth, for the defendant.

On the 28th day of January, 1868, the plaintiff procured a policy of insurance from the defendant, covering a frame and brick building on Magne and Smith streets, Rochester, with machinery therein, and a dwelling-house near it. When applying for the policy, he represented to the defendants that he was the owner of the property, but had sold the same, by contract, to one Curtiss. The policy describes the property as Acer's, but states, "that it is sold, by contract, to Geo. G. Curtiss, who occupies the same." The contract referred to in the policy, is set out in the case. It is dated "April 24, 1867." At this time the legal title to the dwelling-house was in Acer, and the legal title to the rest of the property in Mrs. Brown. She had given him a contract for its conveyance upon the performance by him of certain conditions, which contract he then held, and on which was unpaid the sum of \$550. The contract to Curtiss conveyed all the property, and under it he, at once, went into possession. In June, 1867, by the consent of Acer, Mrs. Brown executed a deed to Curtiss, and sent it to her attorney, by whom it was delivered to Curtiss, and by him placed on record, June 7, 1867. Acer learned of the delivery of the deed as early as December, 1867, so that he knew when he applied for the policy that Curtiss had not only a contract, but a deed. At the time Acer procured the policy, leave was given for \$2000 more insurance, which sum he at once procured. The same day that Acer procured his insurance, he commenced an action against Curtiss, in substance, to have the money due him from Curtiss upon the contract, declared a lien upon the premises referred to in the contract. In June, 1868, Curtiss procured insurance upon the same property for \$4200,

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and in August, 1868, the premises were destroyed by fire and a loss incurred of \$3656.70. All of which was paid to Curtiss, except the trifling loss upon the dwelling-house.

The plaintiff is not entitled to judgment.

I. The policy of insurance under which he claims, was rendered void by the subsequent insurance obtained by Curtiss. The policy in question was issued January 28th, 1868. In June, 1868, other insurance was procured by Curtiss upon the same property to the amount of \$4200. No notice of this subsequent insurance was given to the defendant, nor was it consented to by them, or mentioned in, or indorsed upon the policy. 1. By reason of these facts, the insurance made by the defendants became null and void by the express terms of the condition on which it was granted. The validity and reasonableness of such condition cannot now be questioned. (*Mellen v. Hamilton Fire Ins. Co.*, 17 N. Y. Rep. 609. *Bigler v. N. Y. Central Ins. Co.*, 22 id. 402.) And the condition embraces all subsequent insurance, although procured by Curtiss. (a.) Acer had once an equitable title to the property, but had agreed to sell it to Curtiss. Curtiss had made payment in part, and was in possession of the property at the time of both insurances. Curtiss, as well as Acer, therefore, came within the terms of the condition, which expressly includes "the assured or any other person or parties interested." (b.) The case is unlike the case of *Tyler v. Aetna Ins. Co.*, (12 Wend. 507, and 16 id. 385,) where the condition included only the "assured and his assigns." 2. The reason of the condition applies as well to an insurance effected by Curtiss as to one effected by Acer. (a.) To enable the insurer to ascertain for what proportion of a loss they might eventually be liable for; and (b.) Chiefly, because a knowledge, during the life of the policy, of the amount of the insurance is necessary to enable the company to determine whether it does not exceed the value of the premises. The duty of ascertaining and seeing to it that no other

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insurance is obtained without the consent of the company; and if obtained, that their consent is given in the manner specified, is one assumed by the assured. This case indicates the importance of the provision in question. The defendant was notified that Acer was the owner of the property, but had agreed to sell it to Curtiss. Upon application for this insurance the defendant accepts the risk to the extent of \$1000, and writes upon the policy permission for \$2000 other insurance, thus fixing its insurable value at \$3000. Acer avails himself of this permission; on the same day commences a litigation with Curtiss to enforce his lien, and, directly after, Curtiss procures an insurance of \$4200 upon the same property. In August following the property is burnt, having upon it an insurance of \$7200. The insurer may, for any reason, or without any, at their option, terminate the insurance, upon notice to the assured; but in the case of non-compliance with the provision in question, the insurance, at once, and without notice, terminates. It is no answer to this position, to say that the policy gave liberty for \$2000 other like insurance. That clause was acted upon by the plaintiff in procuring that amount of additional insurance. The other insurance obtained by Curtiss amounted to \$4200. (*See Bigler v. N. Y. Cent. Ins. Co.*, 22 N. Y. Rep. 404.)

II. The plaintiff obtained the policy in question, by misrepresenting to the defendant the nature of his interest in the property insured. He stated that he was the owner; that he had sold the same to Curtiss, and showed to them the contract; that Curtiss had neglected to insure as he had agreed to by the contract, because the rates were too high; and he, the plaintiff, thought it ought to be insured. This representation was made on the 28th day of January, 1868. At this time he was not the owner of the property insured. 1. The legal title to the frame and brick building, containing the machinery, &c., being the first two items insured, and constituting by far the larger part of

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the property, had never been in the plaintiff. At the time of the execution of the contract to Curtiss, referred to in the policy, and from that time down to the execution of the deed to Curtiss, June 3, 1867, the legal title was in Mrs. Brown. After that time, and on the 28th day of January, 1868, the legal title to the whole property was in Geo. G. Curtiss. The plaintiff had himself assented to and procured the execution of the deed to Curtiss. This deed was executed and acknowledged on the 3d day of June, 1867, and recorded in Monroe county clerk's office on the 7th day of June. And as early, at least, as December, 1867, the plaintiff knew that such deed had been executed, acknowledged, delivered and recorded. 2. Curtiss was in the actual possession of all the property insured, from the 24th day of April, 1867, down to, and at, and beyond the time of the insurance in question. The plaintiff, therefore, was not on the 28th day of January, 1868, the owner of the property insured, either at law or in equity. (a.) Not at law, for he had not a deed. (b.) Not in equity, for he had transferred his interest to Curtiss, and given up possession. 3. Curtiss was, at the time the plaintiff procured the policy, in law and equity, the owner of the property in question. (a.) At law, by virtue of the deed. (b.) In equity, by virtue of the contract and possession.

III. The policy is void, because the true character of the interest which the plaintiff had in the property was not absolute, and was not specifically and truly represented to the company, and expressed in the policy in writing. The interest of the plaintiff in the insured property was not absolute. 1. "Absolute" is used in the policy as synonymous with "vested," and is used in contradistinction to "contingent," or "conditional." 2. The plaintiff's interest in all the property insured, was purely contingent, conditional; at the utmost, he had only a lien upon it for the unpaid purchase money. If Curtiss fulfilled his con-

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tract, the whole loss, in case the property was destroyed, would fall on Curtiss, and none on the plaintiff; such an interest can in no sense be absolute. Curtiss was the substantial owner of the property insured. He had the legal title. He was in possession, and if the legal title can be questioned, as obtained by fraud, his equitable interest covered the whole property. This view of the respective interests and titles of Curtiss and Acer, is confirmed by the fact that, in the litigation between Curtiss and Acer, the judgment of the court does not disturb the deed so executed and delivered to Curtiss, but merely declares that Acer has a lien on the premises by way of mortgage. The condition is a reasonable one, and the misrepresentation as to title, material. (*Columbia Ins. Co. v. Lawrence*, 10 *Peters*, 507. *Wilbur v. Bowditch Ins. Co.*, 10 *Cush.* 446. *Walrath v. Ins. Co.*, 10 *Upper Canada R.* 525; cited in *Digest of Fire Ins. Cases*, 578. 10 *id.* 353; cited as above, 579. *Jenkins v. Quincy Ins. Co.*, 7 *Gray*, 370. *Birmingham v. Empire Ins. Co.*, 42 *Barb.* 457.)

IV. An unsuccessful effort on the part of Acer to enforce payment from Curtiss and from the premises, is a condition precedent to the liability of the defendant. The interest of Acer, if any he has, is that of mortgagee; he holds a claim for the money against Curtiss, and has a lien upon the premises described in the contract for its payment. Such was his position when he procured the policy, and it is now declared by the judgment of the court, rendered on his application, presented the very day that he procured the policy. Until in due course of law he fails to enforce it, the defendant is not liable.

V. The whole policy is void if by reason of the above objections any part is. The policy is an entire contract and indivisible. (*Associated Fire Ins. Co. v. Asum*, 5 *Md.* 165. *Lee v. Howard Ins. Co.*, 3 *Gray*, 583. *Smith v. Empire Ins. Co.*, 25 *Barb.* 497. *Kimball v. Howard Ins. Co.*,

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8 Gray, 33. *Lovejoy v. Ayer M. Ins. Co.*, 45 Maine R. 472. *Barry v. Union M. Ins. Co.*, 61 id. 110.)

VI. But, if otherwise, judgment may be rendered for either one of the several items.

By the Court, JOHNSON, P. J. The plaintiff, at the time he procured the policy in question, had an insurable interest in the premises. He held a contract for the purchase from the owner, Mrs. Brown, and had made several payments thereon. Before obtaining the policy, he had contracted to sell the premises to Curtiss, and Curtiss had obtained a conveyance of the fee from Mrs. Brown without the plaintiff's consent. But this conveyance to Curtiss did not affect Acer's rights. Curtiss having full knowledge of the plaintiff's rights, held the title subject thereto, as Mrs. Brown did before such conveyance. The plaintiff still had the equitable title, until his rights were adjusted, as we have held in another case in reference to the same property, under this contract between the plaintiff and Mrs. Brown. It was not a conditional right, but an absolute right, to the extent of his ownership, or equitable title. The plaintiff was not guilty of any fraud, which vitiates the contract, in representing himself as the owner of the property. He exhibited his contract with Curtiss, and the defendants were fully informed of it. The cases of *Chase v. Hamilton Mutual Insurance Co.*, (22 Barb. 527;) *Tyler v. Aetna Insurance Co.*, (12 Wend. 507; S. C., 16 id. 385, in the Court of Errors,) entirely settle both points, as to the insurable interest, and the absence of fraud by means of the representation.

The remaining question is whether the plaintiff's policy was avoided by the act of Curtiss in taking out a policy on the same property, subsequent to the plaintiff's. The plaintiff was ignorant that Curtiss had procured an insurance upon the property until after the loss by the fire had occurred. The plaintiff's insurance was of his own inter-

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est, and that of Curtiss upon his interest in the same property. The plaintiff's policy has this condition: "If the assured, or any other person or parties interested, shall have existing during the continuance of this policy, any other contract or agreement for insurance (whether valid or not) against loss or damage by fire, on the property hereby insured, not consented to by this company," &c., "then this insurance shall be void and of no effect," &c. This is a general provision, and the question is, whether the "other persons or parties interested," specified in the condition, refers merely to parties interested in the plaintiff's insurance, or to other parties who may have a different interest in the property, from that held and owned by the plaintiff, and who may obtain insurance upon their interests in the same property. I am clearly of the opinion that the condition is limited to the former class, and that it was not the understanding or intention that any other person who might have a separate interest in the property, and not connected in interest with the plaintiff, and having no interest in his insurance, might avoid the plaintiff's contract by obtaining an insurance of his own interest in the property, without the plaintiff's knowledge or consent. Such a construction would render the contract exceedingly harsh, unreasonable and oppressive, and the parties will not be deemed to have so contracted, if the language used by them fairly admits of a different interpretation. I think the interpretation I have adopted is not only more in consonance with justice, but with the rules of language. By this rendering, "the parties interested" is construed to mean those interested with the plaintiff in his contract, instead of outside persons who might have some distinct and separate interest in the property. The same construction was given to similar language in the case in 12th and 16th *Wend.* before cited, and also in *The Mutual Safety Insurance Co. v. Hone*, (2 *N. Y. Rep.* 235.) In that case, such words were held to apply only to a double insurance of

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the same interest. I am of the opinion, therefore, that the plaintiff's policy is entirely valid, and that he is entitled to recover the damages sustained by him, to the amount agreed upon, with his costs of the action.

This view disposes also of the other case argued with this, that of *Acer v. The Narraganset Fire and Marine Insurance Co.* Judgment in that case is also ordered in favor of the plaintiff, for the amount of loss and damage agreed upon, with costs of the action.

[MONROE GENERAL TERM, March 7, 1870. *Johnson*, P. J., and *J. C. Smith*, and *Dwight*, Justices.]

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JAMES A. SAXTON vs. JOHN A. DODGE and others.

As to the payee of a note, no notice of the want or failure of the consideration is necessary to constitute it a defense.

Where several payees of a promissory note unite in indorsing the same to one of their number, the latter acquires the interest only of his associate payees, in the note, and is not entitled to protection as a purchaser for value.

And if, in an action brought by him upon the note, the answer sets up a total want of consideration for the note, in matter and manner sufficient to defeat the action, had it been brought in the name of the payees, it is not necessary to allege notice to, or knowledge in, the plaintiff, of the entire worthlessness of the consideration.

Where all the other joint payees of a note transfer their interest to one of their number, and the action is brought by him, he stands upon the same footing, in respect to notice, that he did before. It is not in the power of several joint payees of a note to escape a just defense to it by such a contrivance.

If the payee of a note indorses it to himself, he does not in any respect change his position. An action upon it may be defended, as against him, upon the same principle after the indorsement as before.

He does not stand upon the footing of a *bona fide* indorsee and holder in the usual course of business, the same as though he had not been one of the original payees.

Parties claiming to have a patent, which gave them the exclusive right to make and vend certain reapers and mowers, gave a license to the defendants to make and vend such reapers and mowers, and also to sell territory, for a

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specified consideration, called license fees, which the defendants agreed to pay. They subsequently gave a note for those fees. In an action brought thereon, by an indorsee, the defense was that the patent was void and conferred no exclusive right whatever, upon the payees of the note, and that there was therefore a want of consideration therefor.

Held, 1. That so far as the question of estoppel was concerned, the case stood upon the same footing as it would have done had the action been to recover the license fees.

2. That the defendants might set up a want of consideration for the note, as a defense to the action.

Where a party gets nothing by the contract sought to be enforced against him—neither title nor possession of property—he is not estopped from setting up his defense.

An estoppel cannot be predicated upon a *nudum pactum*.

If the whole arrangement for the sale and purchase of a patent is *nudum pactum*, a stipulation that the purchasers shall not dispute the vendor's right and title, and will not set up any defense against the validity of the patent, in any action against them to enforce their promises, is as void as any other part, and cannot estop.

In an action upon a promissory note given for the purchase money of a patent right, where the defense is a total want of consideration, the inquiry into the validity of the patent, or of the license to sell under it, comes in collaterally only by way of evidence. In such a case this court may inquire into the validity of the patent as well as anything else, for the purpose of determining the question of consideration.

The true test, in all such cases, is whether the judgment upon the issue, allowing the court to have jurisdiction, would affect or determine the right claimed under the patent.

An answer, in such an action, alleging, generally, that the plaintiff made false representations knowing them to be so, but not alleging that the defendants relied upon such statements, and entered into the contract supposing and believing them to be true, does not state facts sufficient to constitute the defense of fraud.

APPEAL by the defendants, from an order made at a special term, directing judgment for the plaintiff upon demurrer to the second, third and fourth counts or defenses of the answer of the defendants, upon the ground of insufficiency, in not stating facts sufficient to constitute a defense.

The complaint alleged that the defendants being copartners, doing business in the city of Auburn, under the

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name, style or firm of "Dodge, Stevenson & Co.," by their said firm name, on or about the 11th day of December, 1865, made, executed and delivered to Ball, Raff & Saxton, their certain promissory note in writing for the payment of money only, of which the following is a copy, to wit:

\$1.70
Int. Rev.
stamp,
canceled. "\$3361.68. Auburn, N. Y., Dec. 11th, 1865.
On the 8th August after date, we promise to pay to the order of Ball, Raff & Saxton, thirty-three hundred, sixty-one and 68-100 dollars, at Cayuga County National Bank, Auburn, value received, with exchange not to exceed $\frac{1}{2}$ per cent.

(Signed,) DODGE, STEVENSON & Co."

And that the payees thereof thereupon, and before the maturity thereof, duly indorsed, assigned and transferred the same to the plaintiff, whereby he became, and was and still is, the lawful holder and owner thereof, and the said note, when it became due, was duly presented where the same is payable, for payment, and payment thereof demanded, which was refused, and the same was thereupon duly protested for non-payment, and due notice thereof given, but that said note remains wholly unpaid, and there still is due and owing thereon from the said defendants to the plaintiff, the said sum of \$3361.68, together with interest thereon from the said 8th day of August, 1866, together with \$1.52 notary fees and expenses necessarily incurred by said plaintiff.

And for a second and further cause of action the plaintiff further alleged, that the defendants, so being copartners as aforesaid, did on or about the 14th day of March, 1866, by their said firm name of "Dodge, Stevenson & Co.," make, execute and deliver to the said Ball, Raff & Saxton, their certain other promissory note in writing, for the payment of money only, of which the following is a copy, to wit:

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\$2.15
 Int. Rev.
 stamp,
 canceled.

" 4226.69. Auburn, N. Y., March 14, 1866.
 On the 13th September after date, we promise
 to pay to the order of Ball, Raff & Saxton, forty-two hun-
 dred twenty-six and 75-100 dollars, at Cayuga County Na-
 tional Bank, Auburn, value received, with exchange not
 to exceed $\frac{1}{2}$ per cent.

(Signed,) DODGE, STEVENSON & Co."

And that the said payees thereupon, and before the ma-
 turity thereof, duly indorsed, assigned and transferred the
 same to the plaintiff, whereby he became, and was and
 still is, the lawful holder and owner thereof. Present-
 ment, non-payment, protest and notice of this note were
 also alleged, and judgment was demanded for \$7588.37,
 and interest thereon, on \$3361.68 parcel thereof from the
 8th day of August, 1866, and on \$4226.69, other por-
 tion thereof, from the 13th day of September, 1866, with
 \$3.10 notary's fees, and the costs and disbursements of
 this action.

The defendants by their answer admitted the execution
 by them of the notes sued upon. For a first defense, the
 defendants denied, on information and belief, that the
 said notes, or either of them, were indorsed, assigned or
 transferred by the payees thereof, Ball, Raff & Saxton, or
 by any one authorized on their behalf, at any time, to the
 plaintiff; and they denied that he was, as alleged, the
 owner thereof, and represented and averred, on the con-
 trary, that the said notes were the property of the payees
 named therein, and that whatever rights and obligations,
 if any, existed by reason of the execution of said notes,
 were due from the defendants to said Ball, Raff & Saxton,
 and not to Saxton, as stated in his complaint.

And for a separate, further and second defense to the
 complaint, the defendants stated, on information and be-
 lief, that prior to the 23d day of October, 1862, one of the
 payees named in said notes, viz., Ephraim Ball, had been,

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as had other parties, engaged in the manufacture and sale of reaping and mowing machines, the essential and prominent features of which were as follows, to wit: A main frame supported by two independent driving wheels, a hinged cutting apparatus, so connected with the main frame as to be capable of rising and falling with the undulations of the ground when in motion; certain combinations of gearing by which, when the machine was propelled, this cutting apparatus was actuated; a brace or drag bar fastened by bolts to the inner part of the finger beam or cutting apparatus, and extending therefrom upon an inclination to the front part of the machine, to which it was attached by a flexible connection, and a brace extending from the rear of the machine to the cutting apparatus, to which it was attached by a flexible joint; the hinged finger beam being so connected, that is, by joints of such character, as to admit of its being raised and lowered independently of the raising and lowering of the main frame, and also so that no part of it projected in the rear of the main frame, nor any part of the main frame in the rear of the finger beam or cutting apparatus, and a rigid tongue. That to these machines, so built by the said Ball, he had given the names, according to size, of Ball's Ohio Mower and Reaper, and the Ohio Mower, Jr. That prior to said 23d day of October, 1862, the said Ball, Raff & Saxton had expressed their desire that the defendants should engage in the manufacture and sale of reaping machines, to be constructed and named as above, and should take from them a license for the use therein of certain patents which they claimed to own, either as inventors or assignees, which they alleged fully protected and covered the several essential parts of said machines herein before designated. That the plaintiff, James A. Saxton, acting for said Ball and Raff, as well as for himself, in such behalf, prior to the execution of the license hereinafter set forth, and at the time of its execution, represented to

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these defendants that letters patent, as follows, were issued by the United States, covering certain improvements described therein, and embodied in said Ohio Reaper and Mower and the Ohio Mower, Jr., to wit:

Letters Patent to E. Ball,	. . .	August 12, 1856.
“ “ “ “	. . .	October 18, 1859.
“ “ “ “	. . .	March 20, 1860.
“ “ “ “	. . .	May 20, 1860.
Letters Pat. to John Butter & E. Ball,		December 1, 1857.
Re-issued,	Sept. 27, 1859.
“	July 17, 1860.
Letters Patent to J. A. Saxton,	. .	Nov. 15, 1859.

And that said letters patent, and each of them, were valid and subsisting patents, and were owned by said Ball, Raff & Saxton, and that they fully protected and covered the several essential parts of said machines, as herein before set forth.

And the defendants stated that they, relying upon the said representations, and believing that they would be protected in the exclusive manufacture and sale of reaping and mowing machines combining the features herein before enumerated and specified, within certain territory hereinafter named, did consent to accept a license from said Ball, Raff & Saxton, and to engage in the manufacture of reaping and mowing machines of the description as aforesaid. That thereupon the said Ball, Raff & Saxton, by and through the said James A. Saxton, as their agent and attorney in fact, did, on the said 23d day of October, 1862, execute and deliver to them a certain license in writing, the said license granting, or assuming to grant, to these defendants certain rights and privileges, in the words following, to wit: “For the consideration and upon the terms and conditions hereinafter mentioned, J. A. Saxton, for himself and as attorney for Ephraim Ball and Daniel Raff, all of Canton, Ohio, hath and by these pres-

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sents doth license and confer on Messrs. Dodge, Stevenson & Co. the exclusive right and privilege of making, using and vending to others to be used, such of the improvements in mowing and reaping machines, specified in letters patent issued to E. Ball, on the 12th day of August, 1856, the 18th of October, 1859, the 20th day of March, 1860, and the 20th day of May, 1860; also to E. Ball and John Butter, on the 1st day of December, 1857, and re-issued to E. Ball on the 27th day of September 1859, and again July 17th, 1860, entitled reissues numbered from 1007 to 1013, both inclusive; also, in a patent issued to J. A. Saxton on the 15th day of November, 1859, and any other patents that we own or control, or may hereafter obtain, as combined in the machine known as Ball's Ohio Mower and Reaper, and the Ohio Mower, Jr., until the expiration of the aforesaid patents, unless annulled before that time, as hereinafter specified, within the States of New York, Wisconsin, except Grant Co., Minnesota, Delaware and the counties of McKeon, Forest, Clarion, Jefferson, Clearfield, Centre, Union, Snyder, Northumberland, Schuylkill, Warren, Carbon, Luzerne, Susquehanna, and the counties north of them in the State of Pennsylvania, with the privilege of selling into exclusively the counties of Cumberland, Perry, Juniatta and those east of the Susquehanna river and south of those above named in the State of Pennsylvania, in common with the parties now manufacturing the said machines in that part of the State. Also, the exclusive right of selling in the State of New Jersey, in common with Messrs. Reese, Melick & Co. of Phillipsburgh. Also the exclusive right to sell in Washtenaw county, Michigan. Also to sell into any other territory in the United States not otherwise specially provided for, until other arrangements are made, when Ball, Raff & Saxton are to give said Dodge, Stevenson & Co. six months notice thereof, and permit them to

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sell any machines they may have in said territory unsold on receipt of said notice.”

And that they, the defendants, did accept and receive said license, and did engage in the manufacture and sale of reaping and mowing machines, which were from year to year varied in form and in detail, but all of which had the features herein before set forth; and the defendants did from time to time account to the said Ball, Raff & Saxton for the machines so made by them, and did pay them large sums of money, to wit: on the 4th day of January, 1864, the sum of \$7500, and other sums at other times, amounting in the aggregate to many thousand dollars.

And the defendants further stated that the notes sued upon herein, were given for license fees under said license, and have no other consideration whatever to support them, except the right to use and vend the improvements described and claimed in said several patents, within the territory herein before and in said license named, so represented to belong to said Ball, Ruff & Saxton, and assumed and pretended by them in said license, to be granted to the defendants as aforesaid.

And the defendants alleged, on information and belief, that said notes were without consideration, inasmuch as the said several patents, as combined in the said machines known as Ball's Ohio Mower and Reaper and the Ohio Mower, Jr., were not valid patents at the time of the execution of said license, for the reason that the same improvements, substantially, were known and used long prior to the date of said several patents and prior to the alleged discovery or invention thereof by the patentees named in said several patents, by many persons in different parts of the United States; and among such persons who possessed such prior knowledge and used improvements the same substantially as those claimed in said patents and combined in said machines, the defendants named the following persons, to wit: John Butter, of Buffalo, New York;

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Jonathan Haines, of Pekin, Tazewell county, Illinois; Hazard Knowles, deceased, formerly of Washington, D. C.; Joel Lupton, of Winchester, Va.; John W. Hubbard, of South Glastonbury, Hartford county, Connecticut; John I. Roane, of Washington, D. C.; John Gore, of Brattleborough, Vermont; and John E. Brown and Stephen S. Bartlett, of Providence, Rhode Island.

And they further stated that they, the defendants, did not know at the time of taking said license, and had no means of knowing, the fact of the invalidity of the said patents for want of novelty, as aforesaid.

And for a third and separate defense, the defendants represented, on information and belief, that there was fraud practiced upon them by the said Saxton, in the making of said license, in the subsequent taking of said money from the defendants, and in procuring of said notes, and the defendants stated that said fraud consisted in this, to wit: 1st. That prior to the date of said license, the said Saxton was interested in, as party or agent, certain suits in the Circuit Court of the United States for the Northern District of Ohio, numbered respectively, 1001 and 1002, wherein Cyrenus Wheeler, Jr., and Cornelius Aultman, respectively, were plaintiffs, and John English, *et al.* and A. McDonald, *et al.*, respectively, were defendants, in which suits the issues involved the dates of the invention of the features of reaping and mowing machines herein before stated as essential features in said Ball's Ohio Mower and Reaper, and Ohio Mower, Jr.; and that in said suits it was fully and conclusively established that long prior to the date of the patents of said Ball, and to the time of his alleged inventions of the improvements described therein, one John E. Brown and one Stephen S. Bartlett had invented, made and used reaping and mowing machines embracing the same features; that these facts were evidenced by depositions and models taken and proved in said suits, and that such depositions and models

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were, upon settlement of said suits, taken from the files of said court by said Saxton and retained by him; he, said Saxton, being fully aware of the facts established by said models and depositions. 2d. And the defendants alleged, on information and belief, that the said several letters patent, so as aforesaid issued to said Ball, were wholly void, for want of novelty, and that they were surreptitiously obtained, and that said Ball, Raff & Saxton, and said Saxton as their agent, well knew that the representations by him made as aforesaid, were untrue; and that said Ball was not the inventor of the said improvements so patented to him; that prior to the date of said alleged inventions by said Ball, persons other than said Brown and Bartlett had invented and used the same devices; and among such persons the defendants stated that John Butter, named in said patent of December 1, 1857, as assignee of one half interest thereof, was in fact the inventor of the improvements named therein, and that the assignment to him by said Ball, was without other consideration than the withdrawal by him, Butter, of opposition to the granting to him, Ball, of said patent, and that such facts were well known to said Saxton, before and at the time of the execution of said license.

And the defendants, for a further separate defense represented, on information and belief, that the said Ball, Raff & Saxton, prior to the time of executing to the defendants herein, the license as aforesaid, and contrary to the averments therein contained, and in violation of the exclusive privileges therein pretended to be granted to the defendants, and in fraud of the defendants' rights in the premises, executed to McDonald, Laughlin & Co., of Wooster, Ohio, a license and privilege to make, use and sell to others to be used, the said Ball's Ohio Mower and Reaper and Ohio Mower, Jr., combining said patented improvements, within the territory named in the license to the defendants as being exclusive to them, and that such

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license was in full force and effect when the license to the defendants was executed, and still continues in force, and that the said McDonald, Laughlin & Co., licensees as aforesaid, had, under their license, made and sold such machines within the territory made exclusive to the defendants herein by their license. And that since the date of said license to the defendants, the said Ball, Raff & Saxton had granted licenses to other parties whose names were unknown to the defendants, in violation of the terms of the defendants' license.

By reason of the premises, the defendants alleged that the said notes in the complaint mentioned, were given by them under an entire mistake of vital and material facts unknown to them at that time, but then and since known to, and fraudulently concealed by said Saxton, and that said notes were consequently without consideration and void.

Wherefore the defendants demanded judgment that the complaint be dismissed, and that they might have judgment against the plaintiff for their costs incurred by reason of this suit, and for such other and further relief as might be equitable and proper.

The plaintiff demurred separately to each defense set forth in the answer, upon the ground of insufficiency in not stating facts sufficient to constitute a defense.

The demurrers in this action and in five other actions against the same defendants, were argued together at the special term; and an order made by the justice holding said term, directing judgment for the plaintiffs, respectively, upon the demurrers, in each of the suits upon the promissory notes; with leave to the defendants to amend on payment of costs.

Geo. Rathbun, for the appellants.

I. All the defenses demurred to in these suits (five in all) are set up for the purpose of establishing the invalid-

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ity of certain letters patent therein set forth, and are based upon the right of the defendants to set up and establish the invalidity, or test the validity of such letters patent.

This court has, and all State courts of general jurisdiction, have jurisdiction to entertain a defense of want of consideration arising from the invalidity of letters patent. The correctness of our propositions can be shown by repeated decisions. It will be found that the highest judicial tribunals of the States, including the Supreme Court of New York, have repeatedly entertained jurisdiction of causes, the defense of which rested on the invalidity of letters patent, and have moreover pronounced upon the validity of patents, and decided that the sale or license of a patent right found by them to be invalid, formed no support for the consideration of a promissory note, and it is just such defenses that are demurred to in these suits. We cite *McDougall v. Fogg*, (2 Bosw. 387;) *Cross v. Huntly*, (13 Wend. 385.) Per Nelson, J.: "It is insisted by the defendant below, that the patent is void on the grounds, 1. That the machine for the making and vending of which the patent was granted, is not a new invention; and 2d. If new *in part*, the patent is void, inasmuch as it is for the *whole machine*, and not for the improvement. If either of these positions were sustained by the proof, the defendant was entitled to judgment in the court below, as in such case a failure of the consideration of the note was shown." (7 Wheat. 356. 3 id. 518. 4 Com. Law R. 357. 6 id. 509. 3 id. 27. 3 Cond. S. C. Rep. 360.) "From the evidence, there cannot be a doubt but that the patent in both respects is defective and void. * * * The patent being void, nothing passed to the plaintiff in error, and the note was given without consideration." Judgment reversed. (*Head v. Stevens*, 19 Wend. 411.) Suit on notes given for purchase of a patent right, verdict below for the plaintiff. Per Cowen, J.: "The learned judge erred in both of his decisions as to the validity of the patent. It

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was void *in toto*, and formed no consideration for the notes." New trial. (*Bellas v. Hays*, 5 S. & R. 427, in the Supreme Court of Ohio.) Money paid on such notes may, on the ground of failure of consideration, be recovered back. (*Dart v. Brockway*, 11 Ohio R. 462. *Dickinson v. Hall*, 14 Pick. 217. *Lester v. Palmer*, 4 Allen, 145, 1862.) "Though the validity of a patent, when *directly* adjudicated upon, is exclusively within the jurisdiction of the courts of the United States, yet when they come into question *collaterally*, their validity must become a subject of inquiry in the State courts." (*Ch. J. Williams in Rich v. Hotchkiss*, 16 Conn. R. 414. *Parrott v. Farnsworth, Brayton*, 174. *Bliss v. Negus*, 8 Mass. R. 46.) The second point made by the counsel for the plaintiffs is that the defendants are estopped from contesting the validity of these patents, because, 1st. They are licensees (or "tenants") under them, and occupy the relation of tenants to their landlords; 2d. Because they have acknowledged the validity of the patents under their hand, in the agreement of license, and have agreed not to set up the invalidity of the patents. 3d. Because they have enjoyed the privileges of the license. Some other points are suggested, but they are subordinate to those above, and must fall with them, if those stated be not well taken. (*Ch. J. Marshall in Blights' Lessees v. Rochester*, 7 Wheat. 535, as cited by plaintiffs.)

In considering this subject, we ought to recollect, too, the policy of the times in which this doctrine originated. It may be traced back to the feudal tenures, when the connection between landlord and tenant was much more intimate than it is at present, when the latter was bound to the former by ties not much less strict nor much less sacred than those of allegiance itself. The propriety of applying the doctrines between lessor and lessee, to a vendor and vendee, may well be doubted. There is, too, a difference between setting up an adverse title in a third

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person, to controvert an actual existing title, and resisting a claim made by a person having no title whatever. In the case last mentioned, it would appear that the plaintiff had a title which was in itself sufficient to maintain his action, but there was another and perhaps a superior title in a third person, with which the defendant was not connected. The rejection of all evidence of this title does not, we think, prove that the same court would have compelled the defendant to acknowledge a title of which no evidence was given, or rejected evidence of any title in himself, especially when the vendee received nothing—not even possession from the vendor.

The mere taking of a license does not estop the licensee from contesting the validity of the patent licensed by it, or avoiding the payment of the note or license money, if the patent is invalid. In support of this proposition, we refer to the cases before cited, to wit: *Cross v. Huntly*, (13 *Wend.* 385;) *Head v. Stevens*, (19 *id.* 411;) *Geiger v. Cook*, (3 *W. & S.* 266;) *Bellas v. Hays*, (5 *S. & R.* 427;) *Dart v. Brockway*, (11 *Ohio Rep.* 462;) *Dickinson v. Hall*, (14 *Pick.* 217;) *Lester v. Palmer*, (4 *Allen*, 145;) *Cragin v. Fowler*, (34 *Verm. R.* 326;) *Clough v. Patrick*, (37 *id.* 421.) In all of which cases the invalidity of letters patent was held to be good defenses to the purchasers or assignees thereof. A license for the use of a patent is a lesser grant than either a total or partial assignment, and it would seem to follow, as a necessary conclusion, that if a purchaser and assignee of a patent can dispute the validity of the patent, and avoid his notes by showing its invalidity, the licensee having a lesser grant, can have the same relief. We also refer to the following authorities directly upon the point: *Neilson v. Fothergill*, (1 *Webs. Pat. Cas.* 290.)

In the last cited case, Lord Cottenham said: * * *
 “That is exactly coming to the point which I put—

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whether at law the party was estopped from disputing the patentee's right, after having once dealt with him as the proprietor of that right. And it appears from the authority of that case, and from other cases, that from the time of the last payment, if the manufacturer can successfully resist the patent right of the party claiming the rent, he may do so in an action for the rent for the use of the patent for that year. The mere taking the license does not estop the licensee denying the validity of a patent." (*Mitchell v. Barclay*, MS. *Shipman, J.*, cited in *Law's Dig. Pat. Cas.* p. 464.)

"The recitals in a deed can estop no one but parties or privies who are claiming under or against it, and in a controversy founded upon its covenants. The purchase of a license forms no bond of allegiance to the patentee, or an estoppel to the licensee from averring or proving any defense in an action for the infringement of a patent, which any other person might use." (*Judge Grier in Burr v. Duryee*, 2 *Fish. Pat. Cas.* 275.) Four of the five pending suits are founded on promissory notes, alleged to have been indorsed to the plaintiffs in the suits; in one, the Wayne County National Bank of Ohio is the plaintiff; in one, James A. Saxton is plaintiff; and in the others, James A. Saxton and John DeWalt are plaintiffs. It is clear that the transfer of the notes does not carry an assignment of the license, and therefore there is no privity between the holders of the notes and the licensees, by which the former can avail themselves of any advantage, by reason of any admissions contained in the license. And it is not pretended that there has been any actual assignment of the licence. "Estoppels are said to be *odious*, and are not favored. *Strangers* cannot avail themselves of an estoppel by mere writing or matter *en pais*." (*Jackson ex dem. Jones v. Brinckerhoff*, 3 *John. Cas.* 101.) "One who is not bound by, cannot take advantage of, an estoppel." (*Lansing v. Montgomery*, 2 *John.* 382.) "Estoppels do not,

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as a matter of course, extend to all who are in any manner, in privity with the principal party." (*Campbell v. Hall*, 16 N. Y. Rep. 575.) Even if the plaintiffs were the licensors, they could not take advantage by way of estoppel, of any admissions in the license of the validity of the patents, (the question of fraud being left out of view,) for the reason that they have not been prejudiced thereby, or influenced into any line of conduct which they would not otherwise have pursued. An estoppel is an admission by the defendant, intended to influence the conduct of the man with whom he is dealing, and actually leading him into a line of conduct which must be prejudicial to his interests, unless the defendant be cut off from the power of retraction. This constitutes an estoppel *en pais*. (*Dezell v. Odell*, 3 Hill, 215. *Thorn v. Bell*, Hill & D. Supp. 430.) Four of the five pending suits are founded on promissory notes, and the complaints contain the usual averments in suits of such nature. The answers which are demurred to, aver that the license to use certain patents formed the consideration of the notes, and that such patents were and are invalid, but the license is not set forth in the pleadings; it is clear, therefore, that the court cannot inquire outside of the pleadings as to the contents of the license, in order to determine whether or not it contains recitals or admissions which operate as an estoppel. The other suit, the fifth, is a suit in equity, by Saxton and DeWalt v. Dodge, Stephenson & Co., and Ephraim Ball, the latter being one of the licensors, and being made defendant because, as alleged in the complaint, of his refusal to unite as plaintiff. In this suit alone is a copy of the license annexed to the complaint, and in this suit alone, therefore, can the court take notice of its contents. All the grounds herein before stated, when considering the operation and effect of a license, as not constituting an estoppel, and the want of privity between the licensees and the plaintiffs, are applicable to this last referred to suit, and need not be repeated.

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An additional reason exists why the demurrers are not well taken, and should be overruled, which is applicable to all the suits, to wit: the fraud practiced by the licensors upon the licensees, in procuring said license and in obtaining the notes and money given and paid under it. It is distinctly averred, in all of the suits, that the licensors had procured their patents fraudulently; that they knew they were invalid, and did not protect or cover the machines made by the defendants; that Saxton, the agent of the licensors, who executed the license, had withdrawn from the files of the court, and suppressed, evidence in the form of depositions, and models showing the want of novelty and consequent invalidity of such patents, and had procured such license, and the money and notes under it, while possessing such knowledge. All these averments the demurrers admit to be true. That fraud avoids every contract into which it enters, is a principle lying at the very foundation of the law. "There is positive fraud when a party intentionally, or by design, misrepresents a material fact, or produces a false impression, in order to mislead another, or to entrap or cheat him, or to obtain undue advantage." (*Story's Eq.* § 192. *Willink v. Vanderveer*, 1 *Barb.* 599.) "Fraud, in the sense of a court of equity, properly includes all acts, omissions and concealments which involve a breach of legal or equitable duty, trust or confidence justly reposed, and are injurious to another, or by which an undue or unconscientious advantage is taken of another." (1 *Story's Eq.* § 187. *Gale v. Gale*, 19 *Barb.* 249. *Whitney v. Allaire*, 1 *N. Y. Rep.* 305.)

Pomeroy & Tracy, for the respondents.

I. The first four suits are on promissory notes, made by the defendants, payable to the order of Ball, Raff & Saxton, and by them indorsed, before maturity, to the respective plaintiffs. 1. The first answers demurred to allege that the notes sued upon in these actions were given for

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“license fees,” under a license granted to the defendants by Ball, Raff & Saxton, by J. A. Saxton for himself and as attorney for Ephraim Ball and Daniel Raff, conferring upon the defendants “the exclusive right and privilege of making, using and vending to others to be used, the improvements in mowing and reaping machines” specified in certain letters patent, “the defendants did accept and receive said license, and did engage in the manufacture and sale of reaping and mowing machines, and the defendants did, from time to time, account to the said Ball, Raff & Saxton, for the machines so made by them, and did pay them large sums of money. That said notes are without consideration, inasmuch as the said patents, as combined in the said machines, * * were not valid at the time of the execution of said license, for the reason that the said improvements, substantially, were known and used long prior to the date of said several patents, and prior to the alleged discovery or invention thereof by the patentees named in said several patents, by many persons in different parts of the United States.” That prior to the granting of such license, “the said Ball, Raff & Saxton had expressed their desire that the defendants should engage in the manufacture and sale of mowing machines, * * * and should take from *them* a license for the use therein of certain patents which *they* claimed to own,” &c. “That the said James A. Saxton, acting for said Ball, Raff & Saxton, as well as for himself, * * * represented to these defendants that letters patent * * * were issued by the United States, covering certain improvements,” &c., embodied in such machine. “And that said letters patent, and that each of them, were valid and subsisting patents, and were owned by said Ball, Raff & Saxton, and that they fully protected and covered the several essential parts of said machine,” &c. And the defendants, “relying upon the said representations, and believing that they would be protected, * * * did con-

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sent to accept a license from said Ball, Raff & Saxton," &c. And that "the defendants did not know at the time of taking said license, and had no means of knowing, the fact of the invalidity of the said patents for want of novelty, as aforesaid." 1st. It was well said by the court at special term, that "in considering the sufficiency of the counts setting up the several defenses above stated, it is material to inquire whether the defendants may avail themselves, in these actions, of any defense which existed against the notes in the hands of the original payees, or whether the plaintiffs are to be regarded as *bona fide* transferees of commercial paper, for value." And that "this question is to be determined by a reference to the facts alleged in the counts demurred to, and in the complaints to which such counts are interposed; neither count can be decided by a resort to another count in the same answer. Each must contain a complete defense in itself." (*Spencer v. Babcock*, 22 Barb. 335. *Swift v. Kingsley*, 24 id. 541. *Brown v. Ryckman*, 12 How. 314. *Cobb v. Frazee*, 4 id. 413.) Each of the complaints, in the actions on the notes, avers that the notes were made by the defendants to the order of Ball, Raff & Saxton, and by them indorsed to the several plaintiffs before maturity. This averment is not denied or controverted by either of the counts demurred to, nor do either of them allege that the plaintiffs were not purchasers for value, or that they took with notice of the defenses interposed. Nor is there any averment tending in any degree to controvert the good faith of the plaintiffs' title, and there is no ground for such presumption. The plaintiffs then having taken the notes before maturity, and being purchasers for value, and without notice of the defenses interposed, are *bona fide* transferees and holders of the same, and the defendants cannot avail themselves, in this action, of any defense which existed against the notes in the hands of the original payees. (*Vallett v. Parker*, 6 Wend. 615. *Rockwell v.*

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Charles, 2 *Hill*, 499. *Mickles v. Colvin*, 4 *Barb.* 304. *Davis v. McCready*, 17 *N. Y. Rep.* 230.) 2. The second answers demurred to, allege "that there was fraud practiced upon the defendants by the said Saxton, in the making of said license, and in the subsequent taking of said money from the defendants, and in procuring of said notes," and states two grounds upon which the allegation of fraud is founded. "And that such facts were well known to said Saxton before and at the time of the execution of said license." The second counts demurred to, setting up the defense of fraud, are insufficient for the same reasons as stated in the point under the first counts demurred to as against the present holders of the notes. The counts setting up the defense of fraud are also insufficient, for it does not appear by such answers that any representations were made to the defendants by their licensors, or that the defendants were misled by any representations of the plaintiffs to their prejudice or injury, or that they were induced to enter into the agreement by any representations, or that they have suffered any loss or damage resulting from any fraud on the part of the plaintiffs, or that the plaintiffs ever knew of any of the facts alleged as constituting fraud. It is only alleged that "Ball, Raff & Saxton, and Saxton their agent, well knew," &c., the facts alleged. This is not sufficient. It must appear "that the plaintiffs made the representations falsely and fraudulently, and with intent to deceive the defendants." (*Addington v. Allen*, 11 *Wend.* 374, [414.] *Wells v. Jewett*, 11 *How.* 242. *Palmer, assignee, v. Smedley*, 18 *id.* 321.) "That the defendants were misled by the representations, or their belief in the truth of the representations induced them to enter into the contract." (*Van De Sande v. Hall*, 13 *How.* 458.) "And that a damage resulted from such fraud, to the defendants, and that they were misled to their prejudice." (*Vernon v. Keys*, 12 *East*, 632, 638. *Story's Eq. Jur.* § 203. *Bacon v. Bronson*, 7 *John. Ch.* 201.) And this must be determined by the

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facts alleged in the count, and cannot be aided by a resort to another count in the same cause. (*Spencer v. Babcock*, 22 Barb. 335. *Swift v. Kingsley*, 24 id. 541.) 3. The third and last answers demurred to in the actions on the notes, allege "that the said Ball, Raff & Saxton, prior to the time of executing to the defendants herein the license as aforesaid, and contrary to the averments therein contained, and in violation of the exclusive privileges therein pretended to be granted to the defendants, and in fraud of the defendants' rights," &c., executed to other parties a similar license to make, use and sell the same machines, and combining the same patented improvements, and within the same territory, &c.; "and that such license was in full force and effect when the license to the defendants was executed, and still continues in force," &c., and that such parties, under their license, have made and sold machines within the territory made exclusive to the defendants by their license. And that "since the date of said license to the defendants the said Ball, Raff & Saxton have granted licenses to other parties * * in violation of the terms of the defendants' said license." The defendants then allege that the said notes "were given by them under an entire mistake of vital and material facts unknown to them at the time, but then and since known to, and fraudulently concealed by, said Saxton, and that said notes are consequently without consideration. The third counts demurred to, setting up the defense of the issuing of other licenses, in violation of the rights of the defendants, are insufficient for the reasons stated in the first point to the first count. The third counts demurred to are also insufficient for the reasons stated in the last point to the second counts demurred to. The third counts demurred to are also insufficient, for the reason that only a violation or breach of contract by Ball, Raff & Saxton is shown.

5. The fifth of said suits is brought by Saxton & DeWalt, to recover royalties or patent fees under the license

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referred to in the actions on the notes. Saxton claims as one of the original licensors, and DeWalt as the assignee of the interest of Raff, and part of the interest of Ball. Ball retaining an interest, and not consenting to unite in bringing the suit, is made a defendant for that reason. The answer of Dodge, Stevenson & Polhemus contains thirteen separate counts. The decision sustaining the demurrers to the eighth, ninth, tenth, eleventh and twelfth counts is appealed from. Each of these counts is set up as a counter-claim. The eighth count, styling itself a counter-claim, sets up in substance, that the agreement of the defendants to pay the license fees was void for want of consideration, the patents to which the license related being void for want of novelty, &c. This count can in no view of the case be a counter-claim. It does not show a demand of any kind against the plaintiffs, and the name of DeWalt does not appear at all. A counter-claim is where the demand is against the plaintiffs, and for which judgment might be recovered against them. (*Tyler v. Willis*, 33 Barb. 327.) And it is a demand existing in favor of the defendants and against all the plaintiffs in the action, and between whom a several judgment might be had in the action. (*Code*, §§ 149, 150. *Davidson v. Remington*, 12 How. 310. *Van De Sande v. Hall*, 13 id. 458. *Duncan v. Stanton*, 30 Barb. 536.) None of the facts necessary to constitute a counter-claim is alleged. The ninth, tenth, eleventh and twelfth counts contain certain demands alleged to have arisen out of transactions of Dodge, Stevenson & Co., defendants, with Ball, Raff & Saxton. Even if these demands have any validity, they exist only against Ball, Raff & Saxton, and are not available as counter-claims in an action brought by Saxton & DeWalt, and they have no connection with the license in suit. (*Ives v. Miller*, 19 Barb. 196, and authorities cited under last point.)

II. The defendants are estopped from setting up the defense of invalidity of the patents in the suit on the notes,

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or on the license. A copy of the license is annexed to the complaint, dated 22d of October, 1862. By its terms the licensors grant to Dodge, Stevenson & Co. the exclusive right and privilege of making, using and vending to others to be used, certain improvements in mowing and reaping machines, specified in several letters patent, therein particularly described, and any other patents that the licensors then owned or controlled, or might thereafter obtain, as combined in the machine known as Ball's Ohio Mower and Reaper, and the Ohio Mower, Jr., until the expiration of said patents, unless the license should be sooner annulled, in the manner thereafter provided for, in certain territory therein described, on the following terms and conditions: 1st. For said privilege, Dodge, Stevenson & Co. agree to pay to the licensors, or their order, fifteen dollars for every machine sold by them, with provision for a discount from that sum in certain cases, but to pay at least five thousand dollars on 1st of January in each year, whether they sell any machines or not. To keep said territory reasonably supplied with machines for sale, and to make and sell no other reaper or mower. 2d. Dodge, Stevenson & Co. thereby acknowledge the validity of said patents, and agree not to dispute or set up any defense against their validity in any action or suit upon, or controversy arising out of said license, or upon any notes or obligations given on settlement of patent or license fees accruing under it. 3d. Dodge, Stevenson & Co. agree to render to said licensors, by 1st of January, annually, an account of the number of machines made by them during the previous year. 4th. All machines made by Dodge, Stevenson & Co. to be numbered consecutively, and to be made of the best materials. 5th. On default in either of said conditions by Dodge, Stevenson & Co., or failure to give the licensors notice by the 1st of September, annually, of their intention to continue said license for the succeeding year, the licensors may revoke the same, but the licensees shall pay

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the said license fee, or agreed damages, on all machines made before said notice is given. It is further agreed, that for all machines the licensees may sell, and fail to get pay for within eighteen months after maturity, in consequence of insolvency of purchaser, the licensor will remit such portion of the license fee as the licensees lose of the price. And this is the same license set up in the answers in the actions on the notes, and is there set out substantially as above, with the exception of the second clause, acknowledging the validity of the patents and agreeing not to defend, &c. The complaint in the equity suit alleges, and the answer admits that after receiving the license, Dodge, Stevenson & Co. manufactured and sold machines under said license, and paid to the licensors large sums as license fees therefor. It appears, then, that these suits are brought for the sole object of recovering the stipulated license fees for such machines as the defendants have actually sold and reaped the profits of by virtue of the license. They cannot, therefore, set up in either suit the alleged invalidity of the patents as a defense, nor can they aver a want of consideration. 1st. It is a well established principle of law that the tenant is estopped from denying his landlord's title, and the lessee from denying the title of the lessor. (*Taylor's L. & E.*, 7, § 339. *Jackson v. French*, 3 *Wend.* 339. 2 *Phil. Ev.* 279, 2d. ed. *Jackson v. Smith*, 7 *Cowen*, 717. *Ingraham v. Baldwin*, 9 *N. Y. Rep.* 45. *C. & Hill's Notes*, 201. *Jackson v. Whedon*, 1 *E. D. Smith*, 141. *Blight v. Rochester*, 7 *Wheat.* 535. *Crosby v. Dickson*, 10 *House of Lords*, 293. *Smith v. Scott*, 5 *Juris. N. S.* 156.) This principle of estoppel between landlord and tenant, and lessor and lessee, as intended to be presented and applied to these cases, is laid down in the case of *Glynn v. George*, (20 *N. H. Rep.* 114,) wherein it is said, "one who is in possession of land under a license cannot dispute the title of the grantee, or the party from whom such license is derived," &c. 2d. The relations between lessor and lessee of a patent right are

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analogous to the relations of landlord and tenant, and the principle of estoppel between landlord and tenant has been recognized as the rule between lessor and lessee of a patent right by the courts since earliest history of legal jurisprudence, as connected with patent rights, and the defendants are estopped from denying the validity of the patents in these suits. (*Taylor's survivors &c. v. Hare*, 4 Bos. & Pull. 260. *Laws v. Purser*, 38 Eng. L. & Eq. 48. *Hills v. Laming*, 24 id. 45. *Hall v. Condon*, 1 Cond. Rep., U. S., 20. *Glenn v. George*, 20 N. H. Rep. 114. *Stevens v. Head*, 9 Verm. Rep. 174. *Wilder v. Adams*, 2 Wood & Min. 329. *Davis & Co. v. Gray*, 17 Ohio Rep. 330, N. S. *Cutler v. Bower*, 11 Ad. & Ell. 253. *Bowman v. Taylor*, 2 id. 278. S. C., 4 Nevill & Man. 264. *Bartlett v. Holbrook*, 1 Gray, 114. *Kernodle v. Hunt*, 4 Blackf. 57. *Kinsman v. Parkhurst*, 18 How. U. S. Rep. 292, affirming 1 Blackf. 488.)

3d. The defendants have acknowledged the validity of the patents under their hands as licensees under the contract, and having agreed not to dispute or set up any defense against their validity in any action or suit upon, or controversy arising out of the license, or agreement, or upon any notes or obligations given on settlement of patent or license fees accruing under it, are estopped from setting up as a defense the invalidity or want of utility or novelty in the patents. (S. C., 2 West. Law J. 396. *Brooks v. Stolley*, 3 McLane, 526. *Burritt v. Rench*, 4 id. 325. *Wilder v. Adams*, 2 Wood & Min. 329.)

4th. The defendants have had the license to make and sell that which they agreed for, and have enjoyed the privileges granted thereunder since the date of the license. They have received profits from it, and they are only asked to pay over the proportion of those proceeds which they agreed to. They have lost nothing in all this, if the patents were invalid. They have never revoked the license. They have had the same benefit they would have had if the patents were valid. They have lost no benefit. The patents have never been

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declared invalid. The defendants have never given notice of the invalidity of the patents; and they are estopped from denying their validity here. An agreement with a patentee to manufacture his patented machine upon certain terms and conditions, or for a stipulated royalty, and making and selling such machines under the patentee's title, and receiving the profits therefrom, estops such party in an action for an accounting, or for a recovery of the patent fees, from alleging the invalidity of the patents. (*Kinsman v. Parkhurst*, 18 *How. U. S. R.* 293. *Sprigg v. Bank of Mount Pleasant*, 10 *Peters*, 257. *Bradley v. Richardson*, 2 *Blackf.* 343. *S. C.*, 8 *N. Y. Leg. Obs.* 146, and cases cited under 2d sub. of *Estoppel*.) 5th. If the patents were invalid, it would not render the sales of the machines illegal, so as to release the lessees from their obligations to their lessor. (*Kinsman v. Parkhurst*, 18 *How. U. S. Rep.* 293. *Sharp v. Taylor*, 2 *Phil. Ch. R.* 801. *Tenant v. Elliott*, 1 *B. & P.* 3.)

III. All the defenses demurred to in these suits are set up for the purpose of impeaching the consideration of the plaintiff's claims by establishing the invalidity, for want of novelty, of the letters patent therein set forth. The jurisdiction to do this is by the constitution (*Const. U. S. art. 3, §§ 1, 2*) vested exclusively in the federal courts, and the former Supreme Court or Court of Chancery of the State of New York had no jurisdiction, and the present Supreme Court of this State has no jurisdiction, to entertain such defense. 1. The jurisdiction to entertain the question of the validity or invalidity of, or want of novelty in letters patent, does not exist in the Supreme Court of the State of New York independently of the constitution and laws of the United States. And no power of jurisdiction can be conferred upon the State courts by congress, under the constitution. (*Const. U. S. art. 3, §§ 1, 2. Dudley v. Mayhew*, 3 *Comst.* 9. *U. S. v. Lathrop*, 17 *John.* 4. *Martin v. Hunter's Lessee*, 1 *Wheat.* 334-7. 3 *Story on*

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Const. §§ 1748, 49. *Manhardt v. Soderstrone*, 1 *Binney*, 138. 1 *Kent's Com.* 372, 1st ed. 3 *McLean*, 180. *Ourtis on Pat.* 516, §§ 405, 406. *Phil. on Pat.* 378, &c. *Sickles v. The Gloucester Manufacturing Co.*, 1 *Fish. Pat. Cas.* 222.) 2. And if congress has the power to confer upon State courts jurisdiction to entertain these defenses, yet it has not done so; but, on the contrary, has vested the jurisdiction exclusively in the federal courts by necessary implication. (*Patent Laws* 1836, § 17. *Dudley v. Mayhew*, 3 *Comst.* 14. *Elmer v. Pennel*, 40 *Maine R.* 434. *Parsons v. Barnard*, 7 *John.* 144. 5 *Pet. Laws U. S.* 124. *Almy v. Harris*, 5 *John.* 175. 5 *Cowen*, 165. *Almy v. Hawkins*, 6 *Blackf.* 125. *Long v. Scott*, 1 *id.* 405. *Patent Laws* 1837, § 2. 9 *John.* 507. *Livingston v. VanIngen*, 9 *id.* 507. 4 *Burr*, 2319, 2323. 5 *Mass. R.* 514. 5 *Watts & Serg.* 163. 2 *Penn. R.* 462. 1 *Paine*, 45. 5 *McLean*, 38, 336. 2 *Wood & Min.* 27. 4 *McLean*, 402. 17 *How. U. S.* 455. 4 *Duer*, 382.) 3. The right to entertain the question of validity or invalidity of patent rights being created by the constitution of the United States, and by congressional legislation, and this court having received no jurisdiction of that question from that source, cannot entertain this defense, for it has no power to do so at common law, and has received no power under the constitution or statutes of this State; and even fraud cannot give this court jurisdiction. (*Livingston v. VanIngen*, 9 *John.* 507. *Parsons v. Barnard*, 7 *id.* 144. *Dudley v. Mayhew*, 3 *Comst.* 14, and other cases before cited.)

By the Court, JOHNSON, J. I am clearly of the opinion that the learned judge at special term was in error in sustaining the demurrer to the second defense set up in the answer. The note on which the action is brought is payable to the order of "Ball, Raff & Saxton."

The complaint alleges that the payees duly "indorsed, assigned and transferred" the same to the plaintiff. This is not denied by the second answer, and must be taken to

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be admitted, so far as is necessary to constitute the plaintiff the sole and exclusive owner and holder of the note for value. The answer in question, in substance and effect, though not in direct terms, alleges that the plaintiff is one of the payees of the note. The learned judge at special term admits that this is fairly to be implied from the averments in the answer. The demurrer to the answer must be taken to admit this fact as true. Thus we have the fact incontrovertibly established, for all the purposes of this issue of law, that the plaintiff is the same person who is one of the joint payees of the note, and that the transfer to him was by himself with the other payees. In other words, that he, by such transfer, acquired the interest only of his associate payees in the note. The answer then sets up a total want of consideration for the note in question, in matter and manner conceded to be sufficient to defeat the note, had the action been brought in the name of the payees. But the answer was held to be defective in this, that it did not allege that the plaintiff, at the time he became the sole and exclusive owner and holder, knew the facts which rendered the consideration of the note worthless. It was held that the plaintiff, although one of the payees, was entitled to protection as any other purchaser for value. Is this so? I think not. It is not disputed that had the action been in the name of all the payees, the allegation of notice or knowledge, of the entire worthlessness of the consideration, would not have been necessary. I think it is equally unnecessary where all the other joint payees transfer their interest to one of their number and the action is brought by him. I can conceive no good reason why he does not stand upon the same footing in this respect that he did before. I do not think it is in the power of several joint payees of a note to escape a just defense to it by such a contrivance. If a payee of a note indorses it over to himself, as the plaintiff has here, he does not in any respect change his position. Obviously,

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it may be defended, as against him, upon the same principle after the indorsement as before. I do not find this precise point anywhere adjudged, but, upon general principles, I think it must be so. He does not stand upon the footing of a *bona fide* indorsee and holder in the usual course of business. He could have no remedy by action against his indorsers, because he is one of them, and no man can be both plaintiff and defendant in the same action. This is well settled by numerous authorities. (1 *Pars. on Notes and Bills*, 137. *Chitty on Bills*, 70, 71, 72. *Smith v. Lusher*, 5 *Cowen*, 688. *Pitcher v. Barrows*, 17 *Pick.* 361. *Mainwaring v. Newman*, 2 *B. & P.* 120. *Neale v. Terton*, 4 *Bing.* 194. *Teague v. Hubbard*, 8 *B. & C.* 345.) If the note passed to him by indorsement, as the pleadings here admit, the plaintiff was necessarily one of the indorsers to himself. This question, it is true, affects only the remedy between indorsee and indorser, and would not affect a third person deriving title *bona fide* from such an indorsee. But it serves, in some degree, to show, I think, that such a transfer as we have here, is out of the usual course of business. But the real point is, that the action is brought by one of the payees, and as to a payee, no notice, of the want or failure of the consideration, is necessary to constitute it a defense. It is very clear, I think, that the plaintiff is not to be regarded a *bona fide* holder, the same as though he had not been one of the original payees.

The defendants are not estopped from setting up this defense against these notes. It appears from the answer, that the note in question was given for the amount claimed to be due, under and by virtue of a certain contract between the defendants and the payees of the note. The said payees claimed to have a patent, which gave them the exclusive right to make and vend reapers and mowers, with certain specified improvements, and gave a license to the defendants to make and vend such reapers and mowers, and also to sell territory for a certain specified considera-

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tion, called lieense fees, which the defendants agreed to pay. The note was given for these fees. The defense is, that this patent was void, and conferred no exclusive right whatever upon the payees of the note. So far as the question of estoppel is concerned, the case stands upon the same footing that it would had the action been to recover the fees. If the payees of the note had no such exclusive right, the defendants acquired nothing by the license. They merely obtained a license to do what they had the same right to do without any license. The license conferred no right, for the licensors had none to confer. I do not see, therefore, why the defendants may not set up this want of consideration in this case as well as in any other arising upon contract. It is not like the case of a landlord and tenant, where the latter gets possession of premises, and has the benefit of the use and occupation, and the rents and profits. Here the defendants received nothing visible or tangible. They obtained only a pretended exclusive privilege, which the licensors did not own or possess, and could bestow upon no one. Under such circumstances, I can see no justice in precluding the defendants from asserting the truth. The true rule, I think, is, that where a party gets nothing by the contract sought to be enforced against him—neither title nor possession of property—he is not estopped from setting up his defense. The case of *Hayne v. Maltby* (3 D. & E. 438) is an illustration of this principle. There A., claiming to have a right to a patent machine, covenanted with B. that he might use it in a particular manner, in consideration whereof, B. covenanted that he would not use it in any other. In an action brought by A., against B., for a breach of this covenant, it was held that B. was not estopped from showing that the invention was not new, and that the patent was therefore void.

So in the case of *Bliss v. Negus*, (8 Mass. R. 46.) In

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that case, in addition to the assignment of the patent for which the note was given, the plaintiff furnished the defendant with certain samples, and some paint to be used in the art. He also sent a man and boy to labor in the art two days, in the presence of the defendant, by way of instruction, which was part of the agreement. And yet the court held that the defendant was not precluded from showing that the patent was void. The court say: "The assignor lost nothing, nor did the assignee acquire anything." As to what was furnished, the court say that as it pertained to the pretended right, and the art, it was neither useful nor valuable to the defendant, and did not affect the principle. In *Dickinson v. Hall*, (14 Pick. 217,) the action was upon a note given in consideration of the assignment by the plaintiff to the defendant, of a limited right to the use of a patented machine for breaking and dressing hemp. The plaintiff covenanted with the defendant that he had a good right, and lawful authority to sell and convey the right, and undertook to warrant and defend the same to the defendant. The plaintiff believed he had a valid and useful right. The defense was that the patent was void; that it was neither a new nor a useful invention. The jury found for the defendant. On motion for a new trial, the court held that the defense was maintainable, and that the defendant, having received no value, his promise was *nudum pactum*. Indeed, it would be quite absurd to hold that an estoppel could be predicated upon a *nudum pactum*.

It does not appear in this case, either by the complaint or the answer in question, that it was part of the agreement that the defendants should not dispute the plaintiff's right and title, and would not set up any defense against the validity of the patent in any action against them, to enforce their promises made in consideration of the license. It does appear in another action between some of these parties that such was part of the defendant's agreement.

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But we cannot go outside of the pleadings in this action, to determine the issue of law raised. It may be remarked, however, that if the whole arrangement was *nudum pactum*, this stipulation by the defendants would be as void as any other part, and could not estop.

There is no force in the plaintiff's objection that this court has no jurisdiction to try the question of want of consideration, because it would necessarily involve an inquiry into the validity of the patent. If the issue was patent or no patent, or right or no right under it, so that the judgment would determine that question, one way or the other, the objection would be well taken. (*Dudley v. Mayhew*, 3 N. Y. Rep. 9.) But that is not the issue here. The action is upon the note, and the defense is a total want of consideration. The issue therefore is, consideration or no consideration, of a promissory note. The inquiry into the validity of the patent, or of the license, comes in collaterally only, by way of evidence. In such cases the court may inquire into the validity of a patent as well as anything else, for the purpose of determining the question of consideration. Cases involving just such defenses as this, are very common in our State courts. In addition to the cases cited on the other point, I refer to the cases in our own court, of *Cross v. Huntly*, (13 Wend. 385;) *Head v. Stevens*, (19 id. 411;) and *Snow v. Judson*, (38 Barb. 210.)

The true test, I apprehend, in all such cases is, whether the judgment upon the issue, allowing the court to have jurisdiction, would affect or determine the right claimed under the patent. All which the judgment in this action could determine would be, whether the note was a valid promise. Indeed, it is plain enough that no United States court would have jurisdiction to try this action, all the parties residing in this State. (*Brooks v. Stolley*, 3 McLean, 523. *Burr v. Gregory*, 3 Paine, 426.)

The third answer, clearly, does not state facts sufficient

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to constitute the defense of fraud. It alleges, generally, that the plaintiff made false representations, knowing them to be so; but does not allege that the defendants relied upon such statements, and entered into the bargain supposing and believing them to be true. The fourth answer is also equally defective, and neither, taken separately, constitutes any defense to the note.

The demurrers to the third and fourth answers are, therefore, well taken, and the order sustaining the demurrers to those answers should be affirmed.

The order, so far as it sustains the demurrer to the second answer, should be reversed, and an order entered overruling the demurrer to that answer and ordering judgment for the defendants thereon, with leave, however, to the plaintiff to notice his action for trial, and try that issue.

[MONROE GENERAL TERM, March 7, 1870. *Johnson, E. D. Smith and Dwight*, Justices.]

JAMES A. SAXTON and JOHN DEWOLT *vs.* JOHN A. DODGE
and others.

THE SAME *vs.* THE SAME.

Where several payees of a promissory note unite in indorsing the same to one of their number and another person, the indorsees stand in the same situation, precisely, in respect to the defense of a want of consideration, that a payee does where the note is indorsed to him alone, by the other payees.

And as, in the latter case, the note is open to the defense of a want of consideration without alleging notice of such want to him, so another person by becoming a holder jointly with the payee, or one of the payees, subjects himself to the same defense.

It will not do to allow a payee to get rid of a defense by transferring a share in his obligation to another. *Per* JOHNSON, J.

By taking an interest or share only in the note he must be held to take subject to any defense which may lawfully be interposed against his co-indorsee.

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APPEAL by the defendants from an order made at a special term directing judgment for the plaintiffs, respectively, upon demurrers to the answers of the defendants. The facts are fully stated in the next preceding case.

Geo. Rathbun, for the appellants.

Pomeroy & Tracy, for the respondents.

By the Court, JOHNSON, J. These actions are both brought upon promissory notes given by the defendants, and made payable to the order of "Ball, Raff & Saxton," for the same consideration as the notes in the case of Saxton against the same defendants, submitted with these cases.^(a) The pleadings are the same, substantially, in the three cases. The only difference is that in these two cases the plaintiff DeWolt is the joint indorsee and holder and owner with Saxton, of the several notes in question. They hold as the indorsees of the joint payees, one of whom is Saxton himself. Without reiterating what is said in the opinion in the other case, my conclusion is that the plaintiffs in these actions stand in the same situation, precisely, in respect to the defense set up in the second answer, that Saxton does in the other action in which he is sole plaintiff. Before the transfer Saxton was one-third owner jointly with the other payees. By the transfer he becomes one-half owner jointly with DeWolt. So far as he is concerned, it is held in the other case that these notes are open to the defense set up in the second answers, in his hands, without alleging notice to him of the want of consideration. And it seems to me very clear that the plaintiff DeWolt, by becoming a holder jointly with the payee, or one of the payees, subjects himself to the same defense. It will not do to allow a payee to get rid of a defense by transferring a share in his obligation to another. By

(a) Ante, p. 84.

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taking an interest or share only in the notes, he must be held to take subject to any defense which may lawfully be interposed against his co-indorsee. The decision should therefore be the same as in the other case.

Order reversed, and demurrer to second answer overruled.

[MONROE GENERAL TERM, March 7, 1870. *E. D. Smith, Johnson and Dwight, Justices.*]

MELLISSA M. JOHNSON vs. WILLIAM A. BROWN.

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A plaintiff may properly be allowed to amend his complaint, upon the trial, by enlarging his claim for damages.

That is clearly a matter resting in the discretion of the justice, at the trial, and no exception will lie to the exercise of such discretion.

In an action for slander it is proper to allow the plaintiff, after giving evidence to prove the speaking of the actionable words alleged in the complaint, to prove the repetition of the same slanderous charge on other occasions, and subsequent to the commencement of the action.

Though the plaintiff, in such an action, cannot prove the speaking of other and different actionable words, charging a different offense, yet he may prove a repetition of the same charge. This is allowed, not for the purpose of proving a general malicious feeling or intention, on the part of the defendant towards the plaintiff, but to show the degree of malice with which the slander involved in the action was uttered.

It is not erroneous for the judge to charge the jury, in an action for slander, that even if the words were spoken with the qualification, "if reports were true," that will not change the actionable nature of the words.

A charge is equally slanderous and actionable, whether made in that form, or without the qualification. Nor can the mere fact of uttering an actionable charge in that hypothetical form go in mitigation of the damages.

The mere form in which a slanderous charge is uttered has nothing to do with the question of damages.

THIS was an action for slander. The words charged and proved to have been spoken by the defendant were, in substance, that the plaintiff, prior to her marriage, had become pregnant and had gone to a physician and

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had the child doctored away; the proof showing these words to have been first spoken in July, 1866, and in May, 1868, repeated, accompanied by the defendant's assertion that he "could prove it," and that "if it was not so, the plaintiff would take it up;" or with the question, "if it is not so, why don't she take it up?" Repeated also, in substance, on other occasions, coming down to the very week of the circuit at which the trial took place.

The defendant was examined as a witness on the trial, and admitted the conversation in which the alleged slanderous words were uttered; and that in the course of it he said the plaintiff "could not say anything, because she had a child before she was married, *if reports were true.*"

The complaint claimed damages for only \$500, but at the close of the evidence the plaintiff's counsel was allowed to amend, by increasing the claim to \$1000; to which the defendant's counsel excepted.

After the judge had charged the jury, and before the jury retired, the defendant's counsel, in the presence of the court and jury, excepted to that portion of said charge which stated that whether the words were uttered with or without qualification did not change the result, and asked the court to charge the jury that if they found the words were uttered with the qualification, it might be taken in mitigation of damages. The court refused so to charge, but charged the jury that the words were actionable, and it did not change the actionable character of the words although they might have been qualified as the defendant stated. The defendant's counsel excepted to the refusal of the judge to charge as requested, and also excepted in due form to his charge as made by him on the subject of said request.

The jury rendered a verdict in favor of the plaintiff for \$850.

On motion of the defendant's counsel a stay of all proceedings was ordered by the court, and that the defendant

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have ninety days to make and serve a case and exceptions; and that the same be heard in the first instance at the general term, and that all proceedings be stayed until the decision of the general term.

M. Goodrich, for the plaintiff.

I. The words shown to have been spoken by the defendant imputed to the plaintiff illicit pregnancy, together with actual criminality, under the statute, (*Laws of 1845, chap. 260, § 3,*) in having procured and submitted to the destruction of the unborn offspring, an offense not only punishable by indictment, but involving also a degree of moral turpitude wholly destructive of female character. The action was therefore well supported upon the merits, (*Widrig v. Oyer*, 13 *John.* 124; *Martin v. Stillwell*, *Id.* 275; *Young v. Miller*, 3 *Hill*, 21; *Wright v. Paige*, 36 *Barb.* 438, affirmed 3 *Keyes*, 581;) and this even though the imputed offense was charged to have been committed prior to the plaintiff's marriage, and, accordingly, long enough previously to the speaking of the words to have been then barred by the statute of limitations; because the grounds of the action is the possible loss of character, more than the hazard of a criminal prosecution. (*Towns. on Sland. and Lib.* p. 156. *Van Ankin v. Westfall*, 14 *John.* 233.)

II. The proof that the defendant had repeated the same charge in January, 1867, and again during the circuit at which the trial was had, was admissible for the purpose of imputing to him malice in publishing the charge, in the instances counted on in the complaint, for which purpose alone it was admitted. (*Kennedy v. Gifford*, 19 *Wend.* 296. *Inman v. Foster*, 8 *id.* 602. *Towns. on Sland. and Lib.* 481-484.) 1. There are decisions, it is conceded, in conflict with these cases, among which, seemingly, are *Keenholts v. Becker*, (3 *Denio*, 346;) *Root v. Lownds*, (6 *Hill*, 518;) *Rundell v. Butler*, (7 *Barb.* 260,) and *Howard v. Sexton*, (4 *Comst.* 157.) But *Root v. Lownds*, and *Keenholts*

v. *Becker*, on examination, will be found scarcely to be so. Indeed both cases were cited by the court in the decision of *Gray v. Nellis*, (6 *How.* 290,) in support of the very doctrine we are contending for, namely, that "a repetition of the same words at other times and to other persons, may be proved for the purpose of showing malice." 2. But the whole difference between the two classes of cases turns, we submit, on whether or not, in actions for slander, proof of any *other* malice than such as is to be *inferred* from the falsity of the words charged to have been spoken—that is, whether or not, proof of *express malice*, in publishing the words counted on—may be given for the purpose of enhancing the amount of the recovery. In *Howard v. Sexton*, (*supra*,) such proof was held to form no part of the issue, and therefore not admissible in actions of this kind, except when founded on communications which are privileged; and if this be so, then the admissibility of proof showing a repetition of the slanderous words counted on, on other occasions and to other persons, cannot be maintained; otherwise, it can be. 3. Now in the more recent and fully considered case of *Fry v. Bennett*, (28 *N. Y. Rep.* 324,) the same court (in an action for libel, which is strictly analogous to an action for verbal slander) expressly decided that proof of "express malice" *was* admissible, "for the purpose of enhancing the damages," whether the action be founded on communications which are privileged, or otherwise; and consequently that, for the purpose of proving such express malice, in regard to the particular publication counted on, proof of the repetition of the charge, or any other act or language tending to prove such malice, is admissible. Standing therefore upon this proposition as established, we maintain that the above cited cases of *Kennedy v. Gifford*, and *Foster v. Inman*, are fully sustained, and consequently that Justice Dwight was also correct in receiving the evidence in question. (a.) Because *any* repetition of the same slanderous

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charge which is counted on, in the particular case, showing deliberateness, necessarily becomes evidence of actual or express malice on the part of the defendant in making the particular publication counted on; equally so, whether it be a precedent or a subsequent repetition, or whether the repetition be before or after suit commenced; unless, indeed, the repetition in the latter case, as it argues greater persistency, may be regarded as evidence stronger, in the same degree, of the malice involved. (b.) Of course, in neither case is the repeated charge to be taken as the *ground* of recovery, but only as *evidence* of actual malice in the defendant in making the publication which is the ground of recovery in the particular case, and for which, therefore, corresponding damages are to be obtained. There can be no possible injustice in admitting this evidence, since it only enables the injured party to recover for the act sued for, precisely what he ought, whether he has or has not already recovered for a similar injury at the hands of the same party, in the past, or shall do so for a repetition of it in the future. Consequently, the possibility that such a recovery may be had for the future repetition, after it has, as evidence, contributed to a just recovery for a past one, is no impeachment of the justice of the rule which permits such evidence. (*Fowles v. Bowen*, 30 N. Y. Rep. 20, 23.)

III. The exception was not well taken to the rejection of the offer to prove by the defendant, when on the stand in his own behalf, that "it had been reported of the plaintiff," and the defendant "had frequently heard," that she was guilty of the crimes charged against her, before the speaking of the words proved; because, 1. Upon authority, "previous reports" are not admissible in evidence, either in justification or mitigation of the recovery otherwise due for the utterance of slanderous words, even where the offer is to show they were general. (*Mapes v.*

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Weeks, 4 *Wend.* 659. *Inman v. Foster*, 8 *id.* 602. *Kennedy v. Gifford*, 19 *id.* 296. *Van Benschoten v. Yaple*, 13 *How.* 9. *Hotchkiss v. Oliphant*, 2 *Hill*, 510.) 2. This should be so ; otherwise, under unfounded reports, a malicious slanderer might defame his victim with impunity. 3. But the offer was not to show the reports *general* ; only that the defendant had frequently heard the charge from others ; but from how many—whether from more than his mother and brother-in-law—does not appear. Manifestly not from many, since, if it were otherwise, the general character of the plaintiff could not have continued, as was proven, to be good. 4. Again ; for previous reports to be receivable as evidence for *any* purpose for the defendant, it should appear at least that he believed them, and that it was in consequence of that belief that he spoke the words in question. Yet that was not included in the offer as, obviously, it could not be ; for nothing can be plainer than that the defendant published the scandalous charge in question against the plaintiff, not because he was misinformed, but from sheer malice. The offer, in not including the proposition to show that the defendant believed the previous reports, was intrinsically defective. (*Gorton v. Keeler*, 51 *Barb.* 475.)

IV. The exceptions taken which relate to the charge to the jury are too indefinite, and cannot, for that reason, be maintained.

V. The amendment allowed, as it could by no possibility call for any different proof from either party, or take either by surprise, was clearly one that the court was authorized to make, and should have made, under section 173 of the Code. (*Van Ness v. Bush*, 14 *Abb.* 36. *Daguerre v. Orser*, 3 *id.* 86. *Hendricks v. Decker*, 35 *Barb.* 298. *Bedford v. Terhune*, 30 *N. Y. Rep.* 453. *Oayuga Co. Bank v. Warden*, 2 *Selden*, 19. *Catlin v. Gunter*, 11 *N. Y. Rep.* 368.)

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H. V. Howland, for the defendant.

I. The court erred in permitting the plaintiff to amend her complaint upon the trial, after all the evidence had closed, by making her claim for damages \$1000 instead of \$500. (*Code*, § 173. *Dox v. Dey*, 3 *Wend.* 356. *Curtiss v. Lawrence*, 17 *John.* 111. *Corning v. Corning*, 6 *N. Y. Rep.* 97. *Bowman v. Earle*, 3 *Duer*, 691.) In this case, even if the court had the power or discretion to allow the amendment, it was improperly exercised. The amendment could not, in justice, be asked for, on the ground that the plaintiff had proved a stronger case, or greater damages than she supposed herself entitled to, when she drew her complaint and fixed her claim for damages, for she there alleges four causes of action, and only proved two causes of action. No ground or reason existed for the amendment, and it was an unprecedented exercise of power, and was equivalent to saying to the jury that the court was of opinion the plaintiff should receive more than \$500, and they evidently so regarded it. Such a precedent would be unsafe to adopt, in trying actions of tort. (2 *Code Rep.* 66-87. 11 *Abb.* 381. 2 *Sandf.* 669. 31 *How.* 164. 1 *Wait's Dig.* 81.)

II. The questions asked the witness Jacob Gress, were improperly admitted by the court; and the court also erred in refusing to strike out his testimony. The proposition was to prove that the defendant had repeated the same charges, on other occasions than those alleged in the complaint, and even during the sitting of the court, to prove malice. We claim that this proposition in itself is unsound in principle, and it is quite time the court corrected this error, by their decisions; legal malice attaches to all slanderous words actionable *per se*. The law pronounces them wrongful, and therefore malicious. (*Howard v. Sexton*, 4 *Comst.* 157. But if a repetition of these identical words is held admissible for the purpose of proving malice, the law will certainly not extend the rule so far

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that a witness may come upon the stand, and swear "that the same words were not used, but it was the same thing in substance," and have that stand as proof of a repetition of the same slanderous charges. The rule laid down in 4 *Comstock* is, that the repetition of the same words may be proved by way of imputing malice. Here the same words were not used, and the witness gives his opinion merely as to their substance, and the court refused to strike it out. This was clearly error. (*Howard v. Sexton*, 4 *Comst.* 161.)

III. The judge at the circuit erred in refusing to charge as requested, and also erred in his charge, in which he held that "whether the words were uttered with or without qualification, did not change the result;" and also in refusing to charge that if the words were uttered with the qualification sworn to by the defendant, it could not be taken in mitigation. The words testified to by the defendant were: "I said she could not say anything, because she had a child before she was married, if reports were true." These are the words, as he testified to them, and the court refused to tell the jury that if these words were so uttered by the defendant, it was no mitigation, but held if his version was the true one, it did not change the result. It is not strange they get a large verdict in this case. The qualification given to the words by the defendant made them no slander at all. It was no slander to say of her, "She had a child before she was married, if reports were true." The charge must be the crime of abortion. (3 *R. S.* 975, § 21, 5th ed.) Again; the qualification testified to by the defendant, "if reports are true," she had a child, were mitigating, and the court erred in refusing so to charge the jury.

IV. The verdict is excessive, and so entirely disproportionate to the proof as to evidence passion, partiality or prejudice, on the part of the jury. True, these damages were matter of opinion for the jury, but the damages here given are such as to strike mankind, at first blush, as

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beyond all measure unreasonable and outrageous, and everything but the result of cool and candid judgment. And the verdict should, for that reason, be set aside.

By the Court, JOHNSON, J. The plaintiff was properly allowed to amend her complaint upon the trial, by enlarging her claim for damages. This did not in any respect alter the cause of action stated therein, or change the substantial rights of the parties as they existed previously. Its only effect was to enable the plaintiff to recover whatever damage she might establish by her proof, beyond what had been previously claimed. It was clearly a matter resting in the discretion of the justice at the trial, and no exception will lie to the exercise of such discretion. (*Vibbard v. Roderick*, 51 Barb. 616. *Bedford v. Terhune*, 30 N. Y. Rep. 453.)

It was also proper to allow the plaintiff, after giving evidence to prove the speaking of the actionable words alleged in the complaint, to prove the repetition of the same slanderous charge on other occasions, and subsequent to the commencement of the action. The true rule, I think, is that laid down by Gardner, J., in *Howard v. Sexton*, (4 N. Y. Rep. 157.) The plaintiff cannot prove the speaking of other and different actionable words, charging a different offense; but may prove the repetition of the same charge. This is allowed, not for the purpose of proving a general malicious feeling or intention, on the part of the defendant, toward the plaintiff, but to show the degree of malice with which the slander involved in the action was uttered. The repetition of the same charge was offered, and allowed for this purpose only.

The judge charged the jury that it did not change the actionable nature of the words, even if they were spoken with the qualification added by the defendant in his testimony—"if reports were true." The exception to this part of the charge is not well taken. The charge was

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equally slanderous and actionable, whether made in that form or in the form stated by the plaintiff's witnesses. Nor could the mere fact of uttering the actionable charge in that form, go in mitigation of the damages. The request of the defendant's counsel was, that the jury should be charged that in case they found the words were uttered with that qualification, it might be taken in mitigation of damages. This was properly refused. The mere form in which a slanderous charge is uttered, has nothing to do with the question of damages. The motive, in making the charge, is an essential element in estimating damages. But that formed no part of the request or refusal.

These are the only points made by the defendant's counsel, except the point that the damages are excessive, which is clearly untenable. There is no error, and a new trial must be denied, and judgment ordered for the plaintiff, on the verdict.

[MONROE GENERAL TERM, March 7, 1870. *Johnson, E. D. Smith and J. C. Smith, Justices.*]

ELISHA COMSTOCK vs. COE S. BUCHANAN, impleaded &c.

One member of a partnership firm cannot become the individual owner of the partnership property, without the consent, and against the wishes, of the other member.

Although one partner may sell the property of the firm, and give a good title, to a third party, he cannot sell to himself.

A sale to himself is simply void; no right or interest passes; the legal and equitable title remains as it was before the attempted transfer. It is still the property of the firm, though standing in the name of the individual partner.

Thus, where stock belonging to a partnership firm was surrendered by one of the partners, without the knowledge or consent of his partner, to the company, he representing to the secretary that he had authority from, and the consent of, his partner to do so, and procured new scrip to be issued to him, in his own name, in lieu thereof; *Held* that the transfer was fraudulent and

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void; and that an assignee of the partner not consenting to the transfer could maintain an action to have the stock restored, and the title thereto placed in the name and under the control of its rightful owners, subject to such equities as existed against it at the time of the sale to him.

APPEAL by the defendant from a judgment entered at a special term.

The plaintiff, in his complaint, averred that the defendant the Pioneer Paper Company, was a corporation duly organized under and by virtue of the laws of the State of New York, and having a place of business, and located in the town of Milton, in the county of Saratoga; that said corporation had been in existence during the last four years, or about that time, and before the commencement of this action; that the business of said corporation is the manufacturing of a kind of paper called straw print; that the capital of said corporation is and was \$30,000, which is divided into three hundred shares, of \$100 a share; that at the time of the organization of said corporation, and previous thereto, the defendant Coe S. Buchanan, and one Solomon A. Parks, were partners in business under the name of S. A. Parks & Company; that as such partners they subscribed for and became the equal owners of 198 shares of the stock of said Pioneer Paper Company, of \$100 each share; that said stock so owned by the said S. A. Parks & Co. constituted a majority of the stock of said company; that scrip was duly issued to the stockholders, and, among others, the scrip for the stock belonging to the said S. A. Parks and Co., was issued by the said Pioneer Paper Company, and the same was delivered to the defendant Coe S. Buchanan; that about the year 1861, or thereabouts, the defendant Coe S. Buchanan, returned to the secretary of said Pioneer Paper Company, scrip representing stock of the said company, belonging to, and standing in the name of the said S. A. Parks & Co., as above stated, to the amount of \$11,300, and then and there represented to said secretary, that he, the said Buchanan, had

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authority of, and consent from, his partner, the said Solomon A. Parks, authorizing him, the said Buchanan, to deliver up and surrender to said Pioneer Paper Company the said scrip last mentioned, amounting to \$11,300 of said stock, and to receive from said Pioneer Paper Company other and new scrip therefor, running to and issued in the name of the said defendant Coe S. Buchanan; that such secretary, believing and confiding in said representations, and also believing said Buchanan had authority as a partner of the said Parks, and supposing it right so to do, received a surrender of said scrip then belonging to S. A. Parks & Co., to the amount of \$11,300, and thereupon issued new scrip therefor to the said Buchanan solely, and entered such transfer on the books of said Pioneer Paper Company, so that it appears on the books of said paper company that said Buchanan is the sole owner of said last mentioned stock, and solely entitled to vote and receive the dividends thereon; that in fact and in truth the said Buchanan had no authority or consent from Parks to surrender said scrip or stock belonging to said Parks & Co., or to take from said Pioneer Paper Company new or other scrip therefor, running to himself, or to have such transfer of stock to said Buchanan entered upon the books of said Pioneer Paper Company; that such representations of said Buchanan were false, and were made by him for the fraudulent purpose of obtaining the stock without right and against the will of said Parks; that afterwards the said Parks executed a transfer of all his right, title and interest in and to said stock, either legal or equitable, being the equal, undivided half thereof, both that which now stands on the books of the Pioneer Paper Company in the name of S. A. Parks & Co., and also that which stands in the name of said Buchanan on said books, including all that originally stood in the name of S. A. Parks & Co., as herein before mentioned, to the plaintiff; that

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afterwards and before the commencement of this action, the plaintiff notified the defendant, Buchanan, of the transfer by Parks to the plaintiff of his right, title and interest in and to said stock, and demanded of Buchanan that he surrender up said scrip issued to him of said \$11,300, of stock belonging to Parks & Co., so that new scrip could be issued therefor to the plaintiff and said Buchanan jointly; but Buchanan thereupon refused to do so, and claims that he is the absolute owner thereof; that the said Pioneer Paper Company is willing to cancel said scrip so issued to Buchanan solely, if the same shall be returned to them and surrendered for that purpose, and correct their books accordingly.

Wherefore the plaintiff demanded a judgment declaring that the surrender of said scrip belonging to Parks & Co., by said Buchanan to the Pioneer Paper Company, and the issuing new scrip therefor, to and in the name of said Buchanan solely, was fraudulent and void against the said Parks, and is void against the plaintiff as the grantee or assignee of Parks, and requiring the said Buchanan to deliver and surrender up such scrip to be canceled; and that the defendant, the Pioneer Paper Company, be authorized, directed and required to cancel the transfer of said stock to the defendant Buchanan, on the books of said company, and to issue new scrip therefor to the plaintiff and the said Buchanan jointly; or to make such other rule or order, and grant such relief to the plaintiff as should be agreeable to equity and good conscience, and that the plaintiff also recover costs of this action against the defendant Buchanan.

The defendant Buchanan, by his separate answer, admitted the organization of the Pioneer Paper Company, and admitted its general business, as stated in the complaint. He further stated, that about May 1, 1856, he owned certain real estate, water power, and the buildings thereupon, situate in Milton, and certain machinery and

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personal property adapted to the manufacture of paper, subject to the equitable right of said Parks, under a contract to purchase a share thereof. That it was then and there agreed between said Parks and this defendant, that they should become general partners under the firm name of "S. A. Parks & Co." That one half of said real estate should be conveyed to Parks, and he should pay for one sixth thereof to make one half, at the rate of ten thousand dollars, and that he should become one half owner of the personal property, by making the proper charges therefor against him upon the company books. That in pursuance of that agreement, this defendant conveyed to said Parks the undivided half of said real estate, and took back a mortgage for \$4000, in part payment of said purchase money, and the \$1000 balance of said purchase money was not paid by said Parks, but was charged against him upon the company books, in addition to charges for his share of the personal property. That at that time, without counting the amount of said mortgage, Parks had less than \$1000 capital in the concern. That the concern then owned real and personal estate worth about \$13,000, and the balance of said capital belonged to this defendant. That the partnership agreement was verbal, and by its terms, among other things, Parks was to superintend the manufacturing department, and Buchanan was to manage all the other business. That Buchanan was to be allowed interest upon his excess of capital and advances, and the profits to be equally divided, and the losses to be borne equally by each party. That said defendant and Parks carried on business as such partners until March, 1858, when the buildings and machinery, and other personal property owned by them, were mainly consumed by fire, and the partnership was then largely in debt. That it was not then known exactly how the joint affairs would turn out, and how much the remaining property would bring. That at that time

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said partnership practically ceased to exist, and it has never since done much business, except erecting new buildings and paying its debts and winding up its affairs. That upon further investigation it had been ascertained that said partnership could not pay its debts after said loss by fire, and that the amount of such deficiency was about \$8500, over and above the amount received for insurance and from all other assets. That shortly after said loss by fire, it was agreed between Buchanan and Parks, in substance and effect, and they should proceed to rebuild, and as soon as practicable that said Buchanan should get a corporation organized, for the purpose of taking the real estate and other property of the firm of S. A. Parks & Co. That in pursuance of said agreement, the whole insurance money was collected and charged to this defendant, amounting to about \$7500. That this defendant advanced further capital to rebuild said property in part, and the firm became indebted for the residue, and the work proceeded. That in the meantime preliminary measures were taken to organize the corporation, and the same was perfected, and the articles of association filed about April 1, 1859. That about March, 1859, for the purpose of closing up the old firm, and for convenience, it was agreed between this defendant and said Parks, that the name of S. A. Parks & Co. should be used to subscribe for stock of such new corporation. That the firm property should all be sold to said corporation, and with a portion of the proceeds thereof the said stock should be paid up; that this defendant should have the right to sell said stock or use it to pay the debts of the firm, and to reimburse him for moneys advanced by him to pay such debts, so far as the same should be necessary for that purpose; and that after the payment of such debts and liabilities, if any of such stock remained, it should be divided between said parties, according to their interest in the capital of the firm, pro rata. That said corporation was

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afterwards organized, as stated in the complaint. That in pursuance of said agreement between this defendant and Parks, the sum of \$19,800, or 198 shares of the capital stock was subscribed for in the name of S. A. Parks & Co. That the assets of said firm were sold to said corporation, and \$19,800 of the proceeds thereof was appropriated for the payment of said 198 shares. That at the time said corporation was organized, the real estate was subject to an old mortgage of about \$2000, and for the purpose of securing the corporation against the same, \$2500 of the capital stock was assigned to it by S. A. Parks & Co., about April 1, 1859. That about June 27, 1859, \$6000 more of said stock was transferred by said S. A. Parks & Co. to Isaiah Blood, to borrow money upon, to be used to pay said firm debts, or to reimburse this defendant for debts already paid by him. That in the year 1859, said firm debts were pressing, and the firm could not meet them without the sale or transfer of the stock held in the name of said firm, except as this defendant used his individual credit and means for that purpose. That said stock could not then be sold in market for a sum exceeding sixty cents on the dollar. That thereupon, about December 31, 1859, the said firm sold and transferred 113 shares of said stock, standing in their name, to this defendant, individually. That said transfer was made in pursuance of the previous agreement between said Parks and this defendant. That Parks knew of said transfer at the time, or became aware of it soon after, and never made any objection thereto until about January, 1863. That afterwards Parks assented to said sale, and it was agreed between him and Buchanan that he should receive for his share stock for only the amount of his capital. That at the time this defendant took said transfer he was in advance to said firm more than \$11,300, and the full value of the stock would not then reimburse him for his advances for the firm, over and above the advances of

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Parks. That this defendant, ever since the date of said transfer, has claimed that he has acquired an exclusive interest in said 113 shares, and became the sole owner thereof, and has used and treated it as his individual property. That upon a fair accounting between him and said Parks, it will be found that more than said 113 shares of stock belongs to this defendant under said agreement. The defendant admitted that when said transfer was made to him, the old scrip to that amount, issued to S. A. Parks & Co., was surrendered, and new scrip therefor issued to him, and so it appears upon the books of said corporation. That it appears on the books of said paper company that this defendant is the sole owner of said last mentioned stock, and solely entitled to vote and receive the dividends thereon. The defendant further states that he has always been willing and ready that Parks should have his pro rata share of the stock of said corporation, in pursuance of the agreement above stated, provided, upon a settlement between them, any such share should be found due said Parks, of which facts Comstock had full knowledge before the pretended transfer. The defendant admitted that before this action was commenced the plaintiff gave notice to him that he had received a transfer from Parks, and he made the demand substantially as stated in the complaint, and this defendant declined to comply therewith, but stated then in substance as he had done before to Parks, and to the plaintiff, that he was ready and willing to settle the affairs of the said firm of S. A. Parks & Co., and if any share of said stock was coming to Parks under their agreement, he was willing that the same be transferred to him or his assignee, and he has always been ready and willing to do so.

The defendant further stated, upon his information and belief, that said Parks was interested in the matters in question in this action, and he insisted that he was a necessary party hereto.

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Each and every allegation contained in the complaint not admitted, or which was inconsistent with the facts stated in the answer, was denied. The action came on for trial before Justice Bockes at a special term of the Supreme Court, held at his chambers at Saratoga Springs, February 3, 1864.

The plaintiff read in evidence an assignment, duly stamped, under seal, of which the following is a copy:

“In consideration of one thousand dollars to me in hand paid, the receipt whereof is hereby acknowledged, I do hereby sell, assign, transfer and set over unto Elisha Comstock all my right, title and interest in and to all stock of the Pioneer Paper Company, either standing in my name on the books of said company, or standing in the name of S. A. Parks & Co., or in the name of Coe S. Buchanan, or in the name of any other person, excepting one thousand dollars of stock I this day purchased of said Elisha Comstock, and he assigned and transferred to me, and the same stands in my name on the books of the company.

And I further agree and covenant that I am the owner, either legal or equitable, in one undivided half of nineteen thousand eight hundred dollars of said Pioneer Paper Company stock, which originally stood on the books of said company in the name of S. A. Parks & Co., and have lawful right to convey the same.

Witness my hand seal, this 17th day of June, 1863.

SOLOMON A. PARKS. [L. S.]

Executed in presence of Robert Speir.”

The execution of this instrument was duly acknowledged.

It was admitted that the change of stock by the defendant Buchanan on the books of the Pioneer Paper Company was made in December, 1859. The plaintiff then rested.

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The defendant Buchanan moved for a nonsuit, or that the complaint be dismissed as to him, on the grounds,

1st. That the facts proved, and admitted by the pleadings, constitute no cause of action, and do not entitle the plaintiff to any relief.

2d. That it appears from the pleadings that Buchanan had full right to make the transfer in question.

Motion denied, and defendant duly excepted.

At the close of the evidence the defendant Buchanan renewed his motion to dismiss the complaint in this action, on the grounds,

1st. That the facts admitted and proved constitute no cause of action.

2d. That the facts proved that the partnership of S. A. Parks & Co. has ceased to do business for several years, and has been practically dissolved; therefore no action will lie to reform it or restore it to life.

3d. This complaint does not ask for an account or final settlement. This court will not trifle with parties, or be allowed to be trifled with, by a mere idle action which cannot settle the rights of the parties.

4th. That the undisputed proof shows that the transfer in question was in pursuance of the prior authority, or was ratified by the subsequent assent of Parks, before the assignment to the plaintiff.

5th. That the plaintiff has no right to bring this action. The assignment to him is a sham and a fraud upon the court, and he is not the party in interest.

6th. Even if any interest is conveyed to the plaintiff, this action cannot be maintained without bringing in Parks as a party.

7th. That this action is an idle ceremony, because a second action would become necessary to take an account and close up the affairs, (if this action be sustained,) in which last action the same evidence would have to be repeated.

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8th. No averment is made that the defendant is not responsible, and no receiver is therefore asked.

9th. No account or settlement is asked; but, on the contrary, that same is just what he does not ask for, and is unwilling to allow.

10th. No fraud is proved against the defendant.

11th. There is no averment or proof that the debts of the concern have not exhausted the full value of the stock at its highest value at any time up to the commencement of this action.

The court refused to dismiss the complaint as to Buchanan; to which refusal the defendant duly excepted. The court afterwards made a decision in writing, as follows:

“This action having been brought on to trial before the undersigned, one of the justices of this court, without a jury, and after hearing the proofs and allegations of the parties, and the arguments of their counsel, I do find and state the facts of the case as follows:

1st. The defendant the Pioneer Paper Company is a corporation duly organized as stated in the complaint, and was organized about four years ago, since which it has been, and still is, doing business as an incorporated company; that its capital is \$30,000, divided into shares of \$100 each, as is also in the complaint stated.

2d. At and prior to the organization of said company, the defendant Coe S. Buchanan and Solomon A. Parks were partners in business under the firm name of “S. A. Parks & Co.,” and as such partners, and in the name of the firm, they subscribed for and took 198 shares of the stock of said paper company, and thereupon said company issued to them, in their said firm name, scrip in the usual form therefor.

3d. Afterwards, and about December, 1859, the defendant Buchanan returned to said company the scrip for 113 shares of said stock so as aforesaid issued to, and held by, said firm of S. A. Parks & Co., and made a transfer thereof

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and of said stock, on the books of the company, to himself, and procured a cancellation of the same, and obtained in the place thereof an issue by the company of new scrip therefor to himself, and since then has insisted, and still insists, that such stock is his own individual property, and not the property of said firm of S. A. Parks & Co., and that he has a right to control and deal with it as his own separate and individual property in all respects, and it so appears on the books of said paper company.

4th. Such transfer, and the cancellation of said scrip and the issuing to Buchanan of new scrip by said company in place of that surrendered and canceled, were, and each of such acts was, without the authority, consent or approval of said Parks, nor did he ever ratify, sanction or confirm the same, and such acts and proceedings were and still are wholly unauthorized.

5th. The firm business of S. A. Parks & Co. has never been closed and adjusted, although the general business ceased about the time of the organization of the said paper company, and a suit in this court is now pending for an accounting, having for its object the closing up of said firm and the adjustment of its affairs.

6th. On the 17th of June, 1863, and prior to the commencement of the aforesaid action for an accounting, said Parks sold, assigned and transferred to the plaintiff, Elisha Comstock, all his right, title and interest in and to said stock, since which time said plaintiff has been, and still is, the equitable owner of the right and interest of said Parks therein.

And I do decide and adjudge, as matter of law :

1st. That said surrender and cancellation of said scrip issued to the firm of S. A. Parks & Co., and the transfer thereof and of said stock by said Buchanan to himself, and the issuing of scrip to said Buchanan in lieu thereof, were and are, and each of those acts was and is, fraudulent and void.

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2d. That said scrip issued to Buchanan in the place of said scrip originally issued to the firm of S. A. Parks & Co., should be surrendered up and canceled.

3d. That said Pioneer Paper Company should cancel said fraudulent and void transfers on its books, and should further correct its books by erasing the name of Coe S. Buchanan as the holder and owner of the stock so illegally transferred to him.

4th. That the plaintiff, since the aforesaid transfer to him by said Parks, has been the owner of all the right, title and interest of said Parks in and to said stock, subject to all equities in regard thereto as between said Parks and Buchanan, existing at the time of said transfer by Parks to him.

5th. That said plaintiff and Buchanan have been, since said transfer last mentioned, joint owners of said stock, subject, as between themselves, to all equities aforesaid, and the said Pioneer Paper Company should, by its proper officer, issue its scrip to said Buchanan and Comstock jointly therefor.

6th. That the plaintiff is entitled to recover against the defendant his costs and disbursements of his action, to be adjusted, together with an additional allowance of fifty dollars.

And judgment is ordered and awarded accordingly.”

The following opinion was given by the justice at special term.

BOCKES, J. I have not leisure to elaborate my views in this case, but will state very briefly my conclusions.

It will hardly be pretended that one member of a firm can become the individual owner of firm property without the consent and against the wishes of the other member. One may sell the property of the firm and give good title to the purchaser, being some third person, but he cannot sell to himself. A transaction of that character is simply

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void; no right or title passes by it. The title to the property remains where it was before the attempted transfer. Each member of a partnership occupies the position of agent or trustee of the firm, and from his position is incapacitated from becoming the purchaser of the partnership property against the will of the other members. It is his duty to obtain the best terms he honestly can on making a sale, and this duty is incompatible with his wish to buy. So the court will presume against such transaction, and will, on the complaint of other members, hold it injurious, because against a principle of right, and will not permit this presumption to be contradicted. As I had occasion to remark in a recent case, a principle of public policy and natural equity intervenes, and denounces the act as unfair, because accomplished under circumstances of temptation which might lead to violation of just obligations and duties.

In such case the law declares the act a fraud upon the rights of the copartner, and the party is not relieved from the consequences of his act by showing that he has allowed, or is willing to allow the full value of the property. However the case may stand in this regard, the court, on proper application, will at once annul the transaction.

But it is urged that there was, in this case, consent given to the transfer by an original understanding or agreement between Parks and Buchanan, and also by a ratification which, as is said, was equivalent to an original authority.

1st. I find no original authority by which Buchanan could lawfully transfer the stock standing in the firm name, and being firm property, to himself. No such authority existed in writing, nor was there any resting in parol, even admitting that it could be conferred by an oral agreement to that effect. The agreement (if what Buchanan testified to constituted an agreement) was only that he might sell or use the stock to raise money with which to pay off the debts of the firm; not that he might transfer

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the stock to himself. But as I understand the answer, no issue is raised on the question of an original authority from Parks to make the transfer. In the complaint, want of authority is directly averred. I do not see that the answer denies this averment, either directly or by necessary implication. However this may be, an original authority to make the transfer is not established by the evidence; on the contrary, it seems to me well proved that the transfer was without original authority.

2d. After a careful consideration of the evidence, I am led to the conclusion that no ratification or sanction of the transfer, by Parks, is established. Parks swears distinctly that there was none, or to facts which renders such the necessary conclusion, and Buchanan does not swear that there were any.

The question then is simply this: Whether one member of a partnership can sell and transfer the firm property to himself, without the assent and against the will of his copartner. It has been shown above that this cannot be done. Such transaction is simply void, and no title passes by it. It follows that the cancellation of the scrip held in the name of "S. A. Parks & Co.," through Buchanan's procurement, and his transfer to himself, and the issuing to him of new scrip in his own name, by the paper company, was unauthorized, fraudulent in law, and void.

Prior to his assignment to the plaintiff, Parks had good cause of complaint as regards such acts, and by the assignment the plaintiff succeeds to his rights. He was then joint owner of the stock with Buchanan, not a partner but a joint owner, subject to all equities existing at the time of the transfer, as between Parks and Buchanan.

It is insisted that no decree in this case can be made without an accounting. In this, however, I think the counsel is under a mistake. This action is not brought for the purpose of determining the rights of the parties to this stock, or in other words, for the purpose of settling

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the proportion to which they are respectively entitled. Hence it has no necessary connection with the matter of an accounting. While the subject matter of this suit might, perhaps, be incorporated in an action for that purpose, it is still a separate and distinct matter in all respects.

Mr. Buchanan has no right to hold on to this property in his own name, not even while an accounting between him and his late partner is progressing. . He has committed an unlawful act which in law is presumed to be prejudicial to his joint owner of the property; in this case an act which gives him the sole use of stock in a corporation, which use belongs to the joint owners. It does not lie with him to say that he will make it all right on or after an accounting. As to this suit he must stand or fall by the legality or illegality of his acts which are here complained of. He cannot complain if placed where he stood before he attempted the illegal transfer, and he should be placed back in that position. This will not give the property to Parks nor to the plaintiff, who now stands, as regards the stock, in Parks' shoes. But it will be put to the persons who are the joint owners, subject to all equities as between Parks and Buchanan existing at the time of the assignment to the plaintiff. These equities are now in process of adjustment in another suit.

It is not right that Buchanan should, through his own unlawful act, wield the power and influence in the corporation, of a sole owner, not even while a suit is progressing to determine the rights of the parties to the stock. By this transfer he takes the law into his own hands, and determines for himself that he is sole owner. . This the law will not tolerate. The stock should stand in the names of the joint owners until the equities in regard to it are adjusted and decided.

But in whose name or names should the stock now stand on the books of the company? It is not right, as I have above stated, as it now stands to Buchanan, nor would

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it be right to put it in the name either of Parks or of the plaintiff, nor yet right to put it back in the name of the late firm of S. A. Parks & Co.; Parks has no right whatever in it, and the firm, as to this stock, was ended by the assignment to the plaintiff. It must therefore go on the books to Buchanan and Comstock, present joint owners. It will stand, of course, subject to the equities of all parties, to be determined on the accounting. But until that point is reached and their rights settled and decreed, the legal title is in the joint owners, subject to all equities between them. It is quite possible, indeed is probable, that their interests are unequal, but their rights in this regard cannot be determined in this suit, and whether equal or unequal, is only matter of conjecture here. Of course Comstock obtains by this assignment only such undivided share and right in the stock as Parks had, whom he now represents.

I held on the trial that the assignment by Parks to the plaintiff was absolute, and on reëxamining the question, I am confirmed in my opinion. The sale is evidenced by a paper executed under seal, and must be held to evidence the transaction. This shows an absolute and unconditional sale. The paper executed at the same time has no countervailing force, for several reasons. It is not under seal, not stamped, nor does it in terms show Parks to be a necessary party to this action.

It is further urged that the suit is useless, and that the complaint should be dismissed for frivolity; that no substantial good can result from it to the plaintiff.

I think the suggestions above made, in regard to the use which Buchanan may make of the stock, claiming it as sole owner, and it so appearing on the books of the company, is a full and perfect answer to this objection. Besides, it does not lie with Buchanan to say that his own illegal act is of no consequence, while he insists on it as conferring great and substantial benefits on himself.

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It seems very clear to me that the plaintiff is entitled to the relief substantially as demanded.

From the judgment ordered at the special term, the defendant Buchanan appealed to the general term.

E. F. Bullard, for the appellant.

A. Pond, for the respondent.

By the Court, JAMES, J. This action is brought by the assignee of the interest of one member of a copartnership, to set aside a transfer, by another partner, to himself, of certain capital stock of a corporation, owned and held by said copartnership.

None of the exceptions to the findings of fact are well taken. The evidence was not only ample to sustain the findings, but a different finding would have been in disregard of the whole scope and force of the testimony. In fact the exceptions to the findings of fact were not much pressed on the argument. The facts of the case therefore must be regarded as established by the findings of the court below.

The Pioneer Paper Company is also made a defendant, and the prayer of the complaint is, that the transfer of the capital stock on the company's books from S. A. Parks & Co. to Coe S. Buchanan be declared fraudulent and void as against Parks and the assignee of his interest; that the new scrip issued to Buchanan at the time of said transfer be required to be delivered up to be canceled; that said corporation be required to cancel the same and to issue other scrip therefor in the name of the plaintiff and Buchanan jointly.

The decree of the special term is in accordance with the prayer, except that it declares the plaintiff's right to such stock to be subordinate to all equities existing against it,

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as between Parks and Buchanan, at the time of the transfer to the plaintiff.

As was said by the justice who tried this cause, "one member of a firm cannot become the individual owner of the firm property without the consent, and against the wishes, of the other member." One partner may sell the property of the firm and give a good title to a third party, but he cannot sell to himself. A sale to himself is simply void; no right or interest passes; the legal and equitable title remains as it was before the attempted transfer; it is still the property of the firm, though standing in the name of the individual partner. (*Story on Part.* § 101. *Willcox v. Smith*, 26 *Barb.* 351, 2. *Comstock v. White*, 31 *id.* 301.)

It being established by the finding, that the 113 shares of stock in dispute was the property of the firm of S. A. Parks & Co.; that its transfer by Buchanan to himself was without the knowledge, or consent, or authority of his co-partners, it follows that the transfer was fraudulent and void; that the stock should be restored, the title replaced on the books of the corporation, new scrip issued, and the stock and scrip placed under the control and management of its rightful owner.

At the time of the transfer of this stock there had been no dissolution of the copartnership, and from aught that appears from the case, it still remains undissolved, although its general business was long since suspended. It was insisted that this assignment by Parks to the plaintiff worked a dissolution; and there is no doubt that an assignment by one partner of all his right, title and interest in the copartnership property would have that effect. (17 *John.* 525. 6 *id.* 417. 5 *John. Ch.* 144.) But this was not such an assignment; it was a sale and transfer of the interest, merely, which Parks had in this particular stock.

Parks did not thereby dispose of or release his rights in the partnership interest remaining, nor did Comstock be-

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come a member of the firm. The copartnership remained as before, and Comstock became a tenant in common with Buchanan, of the corporation stock, subject to the equities of Buchanan as a member of the copartnership. Subject to such equities, as tenant in common, Comstock had a separate and distinct, although individual interest, in said stock. Standing in his own name alone, Buchanan might dispose of the whole stock and pass a good title; but standing in the name of Buchanan and Comstock, he could not. A tenant in common cannot dispose of the interest of his co-tenant in joint property.

The plaintiff does not bring this action as a partner, but as a co-tenant; he does not sue for a dissolution of the copartnership or for an accounting, but to compel a restoration of property fraudulently taken.

It therefore being established that the stock was copartnership property; that the plaintiff has become the owner of one partner's interest in said stock subject to the equities and rights of the firm; that the nominal title to said stock was fraudulently transferred from the firm to one of said partners, the plaintiff is entitled to have that stock restored, and its title placed in the name and under the control of its rightful owners, subject to such equities as existed against it at the time of sale to him.

It may be, as intimated, that there is no precedent for such a decree; it may be that this is the first case of the kind ever brought before the courts. However that may be, there is manifest propriety in entertaining the action; the judgment of the court below seems to be equitable and just, protecting and preserving the rights of all the parties, and should therefore be affirmed.(a)

(a) The above decision was, on appeal to the Court of Appeals, affirmed by that court; the following opinion being delivered:

MASON, J. None of the findings of the judge in this case are without some evidence to sustain them, and his findings are therefore conclusive upon this

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court, and the judgment of this court must be pronounced upon the facts as found. (*Fellows v. Northrup*, 89 N. Y. Rep. 117.)

Assuming the facts as found by the judge at special term, this transfer of stock standing in the name of, and belonging to, the firm of Parks & Co., by the other partner, Buchanan, to himself, and procuring this company to accept a surrender of the stock and to issue new certificates of stock to himself alone, cannot be sustained in a court of equity. (*The New York Central Ins. Co. v. The National Protection Insurance Co.*, 20 Barb. 468. 4 Kern. 85.) Each partner, while acting within the scope of the partnership business, is deemed to be the authorized agent of the firm; and it is upon this principle that one of the partners can bind his associates. (2 Comst. 528. *Worrall v. Munn*, 1 Seld. 229, 239. *Story on Partnership*, §§ 1, 117.) When he steps out of the scope of the partnership business, and undertakes to transfer the property of the copartnership to himself, he acts beyond the authority of his agency, and his acts become invalid and cannot be sustained. (20 Barb. 558. 81 id. 801. 86 id. 270, 276.)

This stock having been thus illegally transferred to the defendant, and he having procured from this company new certificates of stock to be issued to himself, a court of equity could not do less than was done in this case. (*Pollock v. The National Bank and another*, 3 Selden, 274. *Story on Partnership*, § 227. 2 *Story's Eq. Juris.* §§ 692-702.)

No question can be entertained, on this appeal, as to Parks being a necessary party. If he was a proper or necessary party, the defect fully appears upon the face of the complaint, and the defendant has waived it by his omission to demur to the complaint. (*Depuy v. Strong*, 4 Trans. Appeals, 239. 12 Barb. 18. 2 Duer, 169. 9 How. Pr. 247. 10 Abb. Pr. 134.) This furnishes, also, an answer to the defendant's offer of evidence in fols. 55 to 61 of the case, which was an offer to put in evidence paper No. 1. That evidence, if it could be admissible for any possible purpose, was to show that Parks had still some interest in the stock, and therefore should have been made a party. This evidence, however, was properly rejected, upon the grounds stated by the plaintiff's counsel. That agreement was without a revenue stamp, and there was no offer, even to excuse the omission. The assignment by Parks to the plaintiff was absolute and unconditional, and was under seal and stamped. The writing signed by Parks, Comstock and Wilson was not stamped. Nor was it under seal, and could not, therefore, qualify or vary the prior valid assignment under seal. (*Durgin v. Ireland*, 14 N. Y. Rep. 822. *Webb v. Rice*, 6 Hill, 219. 1 id. 608. *Nelson v. Sharp*, 4 id. 584. *Davidson v. Minor*, 9 How. 524.) The offer of the defendant to go into an accounting between him and Parks, with a view of showing that in the final distribution of assets between him and Parks, there would be coming to him more than this 113 shares of stock, and that he really was equitably entitled to a greater share than his copartner, Parks, was properly excluded.

The plaintiff's claim, in this action, to have this fraudulent and illegal transfer of stock by Buchanan, in the name of the firm, to himself, set aside, could

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not be met by such a defense. The pleadings and the parties before the court will not permit such an accounting. In order to justify such an accounting, Parks was a necessary party to the action. (*Cummings v. Morris*, 25 N. Y. Rep. 625.) If the defendant desired to make such a defense, he should have insisted, at the proper time, that Parks be brought in. This he could have done by demurring to the complaint, and perhaps could have instituted a cross action, and have made both the plaintiff and Parks parties. (25 N. Y. Rep. 681, 684. *Durand v. Hankerson*, 39 id. 298.)

It seems there was then a suit pending between the defendant and Parks for a dissolution, and the winding up of their copartnership matters, and that suit properly involved this issue, and the court were right in excluding that issue from this action, which had for its object the setting aside of this fraudulent transfer of these stocks to himself, and requiring this company to cancel the issue to the defendant, and to issue new stock to the plaintiff and the defendant jointly, leaving all the equities of the copartners as they were. No injustice is done the defendant in this decree. He is simply deprived of an advantage which he thought to gain by his fraudulent and illegal conduct. This suit has no necessary connection with this matter of accounting between Parks and Buchanan, as the action is not brought for the purpose of settling the equitable rights of the parties to these stocks as a part and portion of the assets of the firm, and the defendant has no right to bring such an issue into the cause.

The judgment of the Supreme Court is right, and should be affirmed.

[CLINTON GENERAL TERM, July 12, 1864. *Potter, Boeckes, James and Rosekrans*, Justices.]

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On the 28th of September, 1847, the defendant took a lease of certain premises, from the plaintiff for 12 years, covenanting to pay rent therefor. Under this lease he took or accepted possession, and repeatedly paid rent. He never relinquished this possession, never paid rent to any other landlord, never attorned to any other landlord, and was never ousted or disturbed in the possession which he held under the plaintiff. *Held* that it was no defense to an action upon the lease, for rent, that the defendant, when he took such lease from the plaintiff, was in fact holding under an old lease from G., which he delivered to the plaintiff, but upon the understanding that if it turned out that the plaintiff was not the owner of the land the old lease was to be restored and the rent money paid back; that one C. was in fact the owner, at the time the lease was given; and that the defendant then informed the plaintiff that C. claimed the land.

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The title of C., relied on as a defense, was at most an equitable title, claimed to arise under an agreement with W. C. the plaintiff's grantor, made prior to the lease sued on, whereby C. agreed to convey to W. C. certain city property in exchange for lands in Ulster county, which C. was to select. C. did so convey, and selected this farm, among others, and W. C.'s agent executed a sort of livery of seisin to him, by plucking some tufts of grass, and stating that he delivered possession to C. *Held* that this was insufficient to defeat the plaintiff's action; C. having never in fact taken possession, nor undertaken to enforce payment of the rent; and having never had the legal title, which remained in W. C. until it was transferred by him, by deed, to the plaintiff. Under such circumstances the defendant should not be heard to dispute the title of the plaintiff.

Held, also, that there having been no eviction of the tenant, no paramount title shown, and no attornment to the party holding a paramount title, it might well be doubted whether the defendant could defend under a paramount title without divesting himself of the possession acquired from the plaintiff.

APPEAL from a judgment in favor of the defendant, entered upon the report of a referee.

The complaint contained two counts: 1. For rent upon a lease, under seal, by the plaintiff to the defendant, dated September 28th, 1847, of 108 acres of land in Shandaken, Ulster county, for twelve years. 2. A count for use and occupation of the same lands from September 28, 1847.

The answer set up three defenses: 1. A general denial. 2. Adverse possession by the defendant and those under whom he claims, for twenty-five years. 3. That at the time the lease was executed, the defendant, and those under whom he claimed, had been in possession of the premises fifty years, claiming under title, and that the plaintiff falsely represented that he was the owner in fee, and induced the defendant to give up his former title; and when the defendant signed the lease, gave him a written contract, that, in case he did not own the premises, he would give back to the defendant his old title, and the lease should be void; that soon after, the defendant ascertained he had been imposed upon, and demanded that his title be given up, informing the plaintiff that the heirs of

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Patrick Clark claimed to own the fee of the premises, and that the defendant was the lawful and equitable owner.

The plaintiff's cause of action consisted of, 1. A full covenant deed of the premises in question, from Walter Cunningham and wife to the plaintiff, dated November 7, 1838, recorded in Ulster county clerk's office November 9, 1838. 2. Undisputed evidence that he was a *bona fide* purchaser thereof, and actually paid the consideration at the time of the transfer. 3. That on the 28th day of September, 1847, he gave to the defendant, and the defendant accepted, the lease set out in the complaint, which the defendant had assigned to one Blish, as collateral security, and that Blish had reassigned it to the defendant. 4. That in 1848, 1851, 1852 and 1853, the defendant paid the plaintiff rent on the lease. 5. That the defendant also paid the plaintiff rent on the prior lease he held at the time he took the lease from the plaintiff.

The most favorable facts the defendant could claim from the case, were, 1. A lease to him from one Garretson and wife, dated January 3, 1835, which the defendant surrendered to the plaintiff, when the latter gave him the lease of 28th September, 1847, but the defendant made no claim of title under this, except that it was assumed by both parties that Cunningham had, as was recited in papers read by both parties, the plaintiff's deed, and the defendant's contract, before he deeded to the plaintiff, obtained the title from Garretson, and the defendant's witness, De Groff, swears that Cunningham let Clark have it, "subject to the Garretson lease held by Akerly." 2. That on the 2d day of December, 1837, Cunningham (the plaintiff's grantor) made an agreement with one Patrick Clark, by which Clark was to convey to Cunningham certain property in New York, in consideration of which, Cunningham, among other things, was to pay the balance of \$5400 in land on said Cunningham's Garretson tract—the land to be appraised by said De Groff, and if Clark was dissatis-

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fied with the appraisal, then one Rundle to appraise it, and his decision to be final. 3. That De Groff was agent for Cunningham to lease the property for not exceeding one year, and to supervise, but not to sell or part with title, or to *designate* any or consent to the designation of any. There was a letter from Cunningham, dated March 26, 1838, to De Groff, saying, "the lands must be selected in accordance with the contract, and in no other way; and, if necessary, Major Whitney will go out to aid you." This, it was claimed, referred to the appraisal, but did not confer any power on De Groff to select, or consent to a selection. 4. That Clark performed his contract with Cunningham. 5. That De Groff and Rundle went with Clark, and Clark selected this Akerly farm, as one he would take under the agreement; and De Groff, stooping down and taking up a handful of earth, said, "I give you possession of this farm, in presence of these witnesses." No memorandum thereof was ever made in writing. 6. Cunningham, by the contract between him and Clark, was not to deed till Clark had performed the contract on his part and selected the lands, and he never, in fact, gave him any conveyance of the premises in question. 7. Before purchasing and taking the deed from Cunningham, the plaintiff knew the defendant was in possession of the premises, *but not that he was, or claimed to be, in as Clark's tenant.* That the defendant *himself*, when he took the lease from the plaintiff, told the plaintiff of Clark's title, *and that was all he then knew about Clark's claim.* That there was not a particle of evidence anywhere in the case that he ever knew or heard of Clark's claim, when he purchased in 1838, nor down to 1847, when he gave the defendant the lease. 8. That the plaintiff, when the defendant gave him the lease of September 28, 1847, on the defendant's telling him of Clark's alleged claim, told the defendant, and agreed with him in writing, that if he did not own the property, or could not *hold* it, he would give

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up the lease and pay back the rent. 9. That the defendant has never been evicted by Clark, or any one claiming under him ; neither has Clark, nor his heirs, ever claimed rent of the defendant; but, on the contrary, ever since he took the lease from the plaintiff, he has occupied the premises under that lease; has always claimed to own them under it; and has not claimed or owned any title since the plaintiff gave him the lease.

N. C. Moak, for the appellant.

C. W. Sandford, for the respondent.

HOGEBOM, J. Assuming the facts to be as found by the referee, with some modifications and additions required by the evidence, I am of opinion there should be a new trial.

On the 28th day of September, 1847, the defendant took a lease from the plaintiff for twelve years, of the premises in question, and covenanted to pay therefor the rent, for the recovery of which this action was brought, and under this lease he took or accepted possession, and repeatedly paid rent, to wit, in 1848, in 1851, in 1852 and in 1855. This possession he never relinquished, but continues to the present day; he never paid rent to any other landlord, nor was any ever demanded; he never attorned to any other landlord, and was never ousted or disturbed in the possession which he held under the plaintiff.

The defense relied upon was, that at the time the defendant took this lease of the plaintiff, he was, in fact, holding under an old lease from Freeborn Garretson, which he delivered to the plaintiff, but upon the understanding and agreement that if it turned out that the plaintiff was not the owner of the land (and as one of the witnesses says, could not hold it) the old lease was to be restored and the rent money paid back, with interest.

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It is claimed that one Patrick Clark was, in fact, the owner at the time this lease was given, and that at that time the defendant informed the plaintiff that Patrick Clark claimed the land.

The title of Clark thus relied on was, at most, an equitable title, and was claimed to arise under an agreement with Walter Cunningham, (the plaintiff's grantor,) made about ten years prior to the lease in question, whereby Clark agreed to convey to Cunningham certain New York property in exchange for some lands in Ulster county, which Clark was to select. He did so convey, and Clark selected this farm, among others, and Cunningham's agent executed a sort of livery of seisin to him, by plucking some tufts of grass, and stating that he delivered to him possession. But I think this insufficient to defeat the plaintiff's action.

1. Clark never in fact took possession, or undertook to enforce payment of the rent. He never had the legal title, which remained in Cunningham till it was transferred by him, by warranty deed, to the plaintiff. I think the fair presumption is that Clark and Cunningham arranged the matter in some other way satisfactorily to themselves, leaving Cunningham this property. If this were not so, it is remarkable that Cunningham should undertake to convey by full covenant deed to the plaintiff.

2. The defendant should not be heard to dispute the title of the plaintiff. Holding under an old lease of Freeborn Garretson, (whose title, it is highly probable, Cunningham obtained—although for some inexplicable reason neither the plaintiff nor the defendant have given evidence of the original source of title beyond the existence of the old lease,) which he voluntarily surrendered to accept this new lease of the plaintiff—acquainted also with Clark's claim to the premises, and as is not improbable, with the facts in relation to it, he yet consents to take a lease from the plaintiff. Clark has no better title than he had then ;

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indeed, not so good; for the lapse of time since, without any practical assertion of title, militates against the probable validity of his claim. The defendant pays rent to the plaintiff and is not ousted; does not even ask to have his rent refunded; has not attorned to any other landlord, nor been requested to do so. I think there is some ground for the suspicion that the defendant and Clark are colluding together to defeat the plaintiff.

3. There has been no eviction of the tenant; no title paramount is shown; no attornment to the party holding such paramount title; and it may well be doubted whether the defendant can defend under a paramount title without divesting himself of the possession acquired from the plaintiff. (*Whalin v. White*, 25 N. Y. Rep. 465. 2 Wend. 507. 3 Denio, 214. 4 Comst. 270. 46 Barb. 467. 5 Duer, 447.)

I think the conclusion at which the referee arrived was erroneous; that the judgment should be reversed, and a new trial granted, with costs to abide the event.

MILLER, J. concurred.

PECKHAM, J., dissented.

New trial granted.

[ALBANY GENERAL TERM, March 4, 1867. *Peckham, Miller and Hogeboom*, Justices.]

CRAMER, receiver, &c., vs. BLOOD.

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Although one may have intended to defraud the creditors of another by taking and converting his property into cash, such intention will be rendered harmless by his delivering the proceeds of the sale to the debtor, or his wife who is his authorized agent.

And if he subsequently receives a portion of such proceeds, with like intent, from the debtor's agent, for the use of the debtor and his wife, and to be handed over to them, or for their use, as they may want, such intent will be rendered harmless by his paying over the money to creditors, or to the debtor, or his wife, by his directions.

A settlement between such person and the debtor, and payment of the amount due for such property, or its proceeds, will discharge the former from any liability to creditors of the owner who subsequently obtain judgments against the latter.

A creditor at large of another is not in a situation to question the *bona fides* of a transfer of the debtor's property, or the right of a third person to take such property, or his right to retain the proceeds of its sale.

The statute in relation to conveyances of a debtor's property with the intent to delay, hinder and defraud his creditors, has no application to a fraudulent transfer of such property by any one except the debtor; and no one can avail himself of the statute except a creditor who is hindered, delayed or defrauded thereby. A creditor at large cannot be hindered by such transfer, within the purview of the statute.

Where the cause of action set out in the complaint was that the defendant had in his possession either the property of the plaintiff's judgment debtor, or its proceeds, for which he had never accounted, and the referee found that before the plaintiff's judgment was rendered, the defendant had fully accounted with the debtor for all the property, and proceeds of property in his possession; *Held* that the referee should have granted a nonsuit.

A PPEAL from a judgment entered upon the report of a referee.

The complaint alleged that on the 12th day of October, 1858, one John W. Smith recovered a judgment in this court against William A. Lowd, for \$304.25 damages and costs, upon a bona fide debt owing by said Lowd to said Smith previous to July 1st, 1857; that an execution upon said judgment, against the property of said defendant, Lowd, was duly issued to the sheriff of the county of Saratoga, and delivered on or about October 14th, 1858, which execution was afterwards returned by said

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sheriff wholly unsatisfied; that such proceedings were afterwards had in that action, supplementary to said execution, before the county judge of Saratoga county, pursuant to chapter 2 of title 9 of part 2 of the Code of Procedure, that the plaintiff in this action, by an order of the said county judge, made November 20th, 1858, was duly appointed receiver of the property of said Lowd; that all of the property of the said Lowd, not exempt from execution, was thereby directed to be applied towards the payment of said judgment, and that the plaintiff be allowed \$30, costs of these proceedings; that at the time of the issuing of said execution, and ever since, the said Lowd had resided in the county of Saratoga; that the said plaintiff had filed the security required by said order, and the said property had become vested in him as such receiver, and he had given notice thereof to the defendant.

The plaintiff further stated, upon information and belief, that with intent to cheat and defraud the said Smith and the other creditors of said Lowd, the defendant took from said Lowd and carried away, during the fall of 1857 and the winter following, a large quantity of buckwheat, oats, potatoes, pork, hay, chickens, calves and other property belonging to said Lowd, and the defendant converted the same to his own use, and had never paid the said Lowd therefor; that since July 1st, 1857, the defendant had also received from said Lowd and his agent, large sums of money, the property of said Lowd, without any consideration, and with a view of defrauding the said Smith and preventing him from collecting said debt. That the said Lowd had pretended to sell said property to Blood, and had pretended to give him releases for said causes of action, but the plaintiff averred that all of the said sales and releases were executed with intent to defraud the said Smith out of his said debt.

The plaintiff further stated that the defendant had received property and money of said Lowd to an amount

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exceeding \$400, with intent to defraud the said Smith, and had never accounted for the same. That the plaintiff had made application to said Blood to account for said property, but he neglected to do so. That said judgment remains wholly unpaid, and the said Lowd has no other property out of which the same can be collected. Wherefore the plaintiff demanded judgment that said sales and releases, by said Lowd to the defendant, be declared fraudulent and void as against said judgment, and that the property and money received by the defendant be declared liable for the payment of said judgment, and that an account be taken of said property, and that the said defendant be adjudged to pay the value thereof to the plaintiff, to satisfy the said judgment and costs; and for general relief.

The defendant, by his answer, for a first defense, denied that during the fall of 1857, or the winter following, or at any other time, he took from said Lowd, or carried away with intent to cheat or defraud the said Smith or other creditors of Lowd, any buckwheat, oats, potatoes, pork, hay, chickens, calves or other property belonging to said Lowd. He also denied that he at any time converted any of said property to his own use, or that he was in any way indebted to said Lowd therefor. But, on the contrary thereof, he averred that he had paid to said Lowd the full value of all property which he had at any time directly or indirectly received from him, except one single harness left by the said Lowd on the premises of the defendant, in the summer of 1858, which said harness is still the property of said Lowd, and ready to be delivered to the plaintiff; and the defendant averred that he offered, by and through his agent and attorney in this action, to deliver said harness to the plaintiff before this action was commenced. He also denied that since July 1st, 1857, or at any other time, he received from said Lowd, or his agent, any sum or sums of money, the property of said

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Lowd, without any consideration, or with a view of defrauding Smith, or preventing him from collecting his said debt against Lowd. He also denied that Lowd ever pretended to sell him any property of any sort or description, with the knowledge of the defendant, with intent to defraud Smith out of said debt, or that Lowd ever pretended to give him releases for said property or for any cause or causes of action, with the knowledge of the defendant, with intent to defraud Smith out of his said debt. As to the intent of the said Lowd, as charged in the complaint, the defendant had no knowledge or information sufficient to form a belief, but he positively averred that if any such intent existed in the mind of Lowd, it was unknown to the defendant, and that he did not participate, in any of his dealings with Lowd, in any such intent. The defendant also denied that he had received property and money of Lowd, to an amount exceeding \$400, or any other amount whatever, with intent to defraud Smith. He also denied that he had received any money or property of Lowd for which he had failed or refused to account; but on the contrary thereof, averred that he had fully accounted for all money and property of said Lowd which at any time came to his possession or control. As to the allegations of the complaint in relation to the amount due from Lowd, before and at the time the alleged judgment of Smith was obtained against him, and the amount remaining unpaid thereon, the defendant had no knowledge or information sufficient to form a belief.

For a second defense, the defendant alleged that on or about the 1st day of September, 1858, he and the said William A. Lowd accounted together and made a full, fair and final settlement of all accounts, dealings, claims and demands between them, upon which accounting and settlement a balance was found due from said Lowd to the defendant, which balance still remains unpaid.

For a third and partial defense, the defendant alleged

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that the pork mentioned in the complaint was taken to market by him at the request of Lowd and his wife, and also by request of Smith; that he sold said pork and returned the proceeds thereof to the wife of said Lowd, by his directions; that the said pork was claimed by Smith, by virtue of a chattel mortgage executed to him by Lowd; that Smith afterwards commenced an action against the defendant for taking and carrying away and converting said pork, before this plaintiff, who was and is a justice of the peace for the town of Waterford, in the county of Saratoga, in which action judgment was duly given by said justice, in favor of said plaintiff and against the defendant, for the value of said pork, which judgment had been affirmed on appeal to the county court of Saratoga county, and judgment therein duly given by said court in favor of Smith, against this defendant.

And for a fourth and partial defense, the defendant alleged that in the fall of 1857, Lowd was possessed of a yearling colt, and that said colt was claimed by Smith, under and by virtue of the chattel mortgage aforesaid; that said colt was for a short time in the possession of this defendant; that Smith commenced an action against this defendant, in the Supreme Court, for the recovery of said colt, with damages for her detention; that in said action a judgment was obtained by the said Smith against this defendant for the recovery of said colt, if a recovery thereof could be had, and if not, for \$60, the value of said colt, with damages and costs; that said judgment was duly entered and docketed in the office of the clerk of Saratoga county, and an execution thereon duly issued to the sheriff of Saratoga county; that the said sheriff did not recover said colt, and that this defendant paid to William B. Harris, the under-sheriff of said county, in whose hands the said execution was, and before the return day thereof, the full amount of said judgment and execution, and that nothing is now due thereon to the said Smith.

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The action was referred to a referee, and tried before him; who found the following facts:

First. That John W. Smith, by a written lease executed 25th March, 1857, rented unto William A. Lowd his farm in Easton, Washington county, from April 1st, 1857, to April 1st, 1858, for the rent of \$450, payable as follows: \$225 December 1st, 1857, and \$225 April 1st, 1858.

Second. That Lowd gave to Smith a chattel mortgage upon a colt, certain hogs, and other personal property, as security for the payment of said rent, and went into the possession of the premises and occupied the same under said lease.

Third. That on the 12th day of October, 1858, Smith recovered a judgment against Lowd for \$304.25 damages and costs, for the balance of said rent, as stated in the complaint in this action. That execution was issued upon said judgment, and the same was returned, and supplemental proceedings had therein and the plaintiff appointed receiver therein, and accepted the trust and gave the security, as stated in the complaint.

Fourth. That said judgment remained wholly unpaid, and Lowd had no property out of which said judgment could be collected on execution, at the time said execution was in the hands of the sheriff.

Fifth. That about the 12th day of October, 1857, and before any part of said rent became due, with intent to defraud said Smith, the defendant took and carried away a quantity of potatoes, buckwheat, pork, hay and calves, and other property of said Lowd, and converted all of his chattel property liable to execution into money.

Sixth. That with like intent the defendant soon after handed over the money arising from the sale of said property, by direction of William A. Lowd, to Catharine Lowd his wife.

Seventh. That before the defendant received or disposed of any of the property above mentioned, William A. Lowd

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was taken sick, and continued sick until in December, 1857, during which time the control and management of his property was by him placed in the hands of the said Catharine Lowd, his wife.

Eighth. That with like intent the defendant, afterwards and about November 25th, 1857, induced the said Catharine Lowd to place a portion of said money, amounting to \$200, in the hands of the defendant, for the use of said Lowd and wife, and to be handed over to them or for their use as they might want.

Ninth. That afterwards, and about March 15th, 1858, the defendant became security to one Mancius for the rent of a farm leased by Lowd of him, to the amount of \$120; but the lease thereof was taken in the name of the said Catharine. That on the 1st day of April, 1858, the defendant paid to said Mancius \$100 on account of said rent, and the balance of said rent was paid by the said Catharine about April 15, 1858.

Tenth. That about December 12, 1857, Smith commenced an action against Blood, in a justice's court, charging Blood with fraudulently selling the hogs above mentioned, and impairing his security upon his chattel mortgage, and recovered a judgment thereon for \$60 damages, besides costs, January 16th, 1858, for the value of said hogs, less the value of killing and carrying the same to market. That the defendant appealed from said judgment to the Saratoga county court, where the same was affirmed December 11, 1858, and the said judgment, and the costs of said appeal, were collected, on execution, from the defendant in March, 1861.

Eleventh. That Smith commenced an action against Blood, in the Supreme Court, in March, 1858, for the recovery of said colt, and on the 30th day of August, 1858, recovered a judgment against said defendant for the pos-

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session of said colt, with \$5 damages and \$55.13 costs, which judgment was collected of Blood on execution.

Twelfth. That the defendant also paid over to Charles Moore \$31.50 upon Lowd's note, upon which Blood was security, and which note and security were given prior to the defendant's receiving or selling any of the property of Lowd above mentioned.

Thirteenth. That from the 25th of April to the 25th of May, 1858, both days inclusive, the defendant paid to Lowd in cash, and to his wife, at his request, and sold to him goods, wares and merchandise, to the amount of \$20.60.

Fourteenth. That during the illness of the said Lowd, in the fall of 1857, the defendant performed work, labor and services for the said Lowd, in gathering and marketing the property above mentioned, to the amount and which were of the value of \$25, for which he has received no compensation.

Fifteenth. That this action was commenced on the 4th day of December, 1858, in the name of the receiver above mentioned.

As conclusions of law, the referee found the following:

1st. That the payment to Mancius of \$100, on the 1st day of April, 1858, together with the sum of \$20.60 for money paid and goods sold to Lowd by the defendant, between April 25th, and May 25th, 1858, afforded no protection to the defendant against the claim of Smith, to have satisfaction of his said judgment, to the extent and out of the money in the hands of said defendant belonging to Lord.

2d. That the defendant should be allowed the \$60 damages paid upon the pork judgment, with the sum of \$31.50, paid upon the Ensign note, together with the sum of \$25 for services, amounting in all to the sum of \$116.50, and that the same should be deducted from the \$200 in his hands, leaving the sum of \$83.50 in the hands of said defendant.

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3d. That the plaintiff herein, as receiver, was entitled to have a judgment against said defendant for the sum of \$83.50, with the interest thereon from April 1st, 1858, amounting in all to the sum of \$133.50, with the costs of this action.

Judgment being entered accordingly, the defendant appealed.

A. Pond, for the appellant.

E. F. Bullard, for the respondent.

By the Court, ROSEKRANS, J. The facts found by the referee do not sustain his conclusions of law, or the judgment rendered in the action. If the defendant intended to defraud the creditors of Lowd by taking and converting the property of Lowd into cash, such intent was rendered harmless by his delivering the proceeds of the sale to Lowd or his wife, who was his authorized agent; and if he subsequently received a portion of such proceeds, with like intent, from the agent of Lowd, for the use of Lowd and his wife, and to be handed over to them, or for their use as they might want, such intent was rendered harmless by his paying over the money to Lowd's creditors or to Lowd or his wife by Lowd's direction. The creditors of Lowd could not be injured by the defendant's possession of the property of Lowd, or his sale of such property, or his possession of the proceeds of such sale. Either could be reached in the hands of the defendant by any creditor who was in a condition to seize the property under execution against Lowd, or its proceeds under proceedings supplementary to execution or creditor's suit. Besides, it appears from the proceedings of the referee, that while any of Lowd's property, or the proceeds of its sale, were in the possession of the defendant, the creditor upon

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whose judgment the plaintiff was appointed receiver, was only a creditor at large of Lowd, and was not in a situation to question the *bona fides* of the transfer of the property of Lowd, nor the right of the defendant to take his property, nor his right to retain the proceeds of its sale. And whatever wrongs may have been committed by the defendant in relation to Lowd's property or its proceeds, it appears, from the findings of the referee, that they were fully settled between Lowd and the defendant before the judgment of Smith was obtained. This settlement and payment of the amount due to Lowd discharged the defendant from any liability to the creditors of Lowd, who subsequently obtained judgment against him. The statute in relation to conveyances of a debtor's property, with the intent to delay, hinder or defraud his creditors, has no application to a fraudulent transfer of such property by any one except the debtor, and no one can avail himself of the statute except a creditor who is hindered, delayed or defrauded thereby. A creditor at large cannot be hindered by such transfer, within the purview of the statute referred to. The referee should have granted a nonsuit, as asked for by the defendant, for the reason that the evidence did not show any money or property of Lowd in the possession of the defendant at the time the judgment of Smith was obtained, and for the reason that it appeared that the defendant had previously fully accounted with Lowd for all property or money received from him or his wife. The cause of action set out in the complaint was, that the defendant had in his possession either the property of Lowd or its proceeds, for which he had never accounted; and this was the only cause of action for which the plaintiff could recover. And after the referee had found that before judgment was rendered against Lowd the defendant had fully accounted with Lowd for all the property and proceeds of property of Lowd in the defend-

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ant's possession, there remained no cause of action against the defendant, the settlement not having been found to have been unfair or fraudulent.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

[CLINTON GENERAL TERM, May 7, 1867. *James, Potter and Rosekrans*, Justices.]

GRANT and others vs. VANDERCOOK.

Proceedings to foreclose a lien, under the mechanics' lien law, are purely ~~in~~ *rem*, founded on statute, and cannot be used for any other purpose than such as the statute contemplates.

Such proceedings operate only as a foreclosure of the lien, and not as an action for the collection of a debt.

The judgment in these proceedings is designed to enforce the lien; and unless one is recovered and docketed during the life of the lien, i. e., within one year from the time of the creation of the lien—none can be recovered afterwards.

A judgment recovered after the expiration of the year is unauthorized and void, and will be vacated on motion.

If the lien has expired or failed, no judgment whatever can be rendered for the claimant. He cannot convert his proceedings into an action for the recovery of money upon a personal contract, and insist upon the defendant's personal liability.

A PPEAL by the defendant from an order made at a special term denying a motion to set aside a judgment as irregular and void.

This was a proceeding instituted by the plaintiffs as claimants, against the defendant as owner, under the act of the legislature of 1854, as amended by the act of 1858, to foreclose a mechanic's lien on certain premises of the defendant situate in the town of Watervliet, Albany county, N. Y. The lien was created and filed in the town clerk's office of that town September 6, 1867. A notice,

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substantially in the form prescribed by the statute, stating the claim to be for \$224.10, for materials furnished for, and used upon, two houses of the defendant in Watervliet, (describing the lots,) and notifying the defendant to appear and answer, or that judgment would be taken against him for the amount of the claim, to enforce said lien, accompanied by the usual bill of particulars of the plaintiff's claim, was served on the defendant April 18, 1868. An answer was served, in June, 1868, denying the claim and the amount; denying the purchase of the materials, and denying the regularity of the lien.

Judgment was not entered, in such proceeding, until May 29, 1869, being one year and eight months after the lien was created and filed, and it was then entered upon a trial of said issues before the judge holding the May circuit, in the absence of the defendant, who failed to appear. The findings of the judge established the plaintiffs' claim at \$224.10, with interest; declared the filing of the lien, and the materials to have been furnished for the houses specified in the notice; and ordered judgment in favor of the plaintiffs, for the amount claimed. Judgment was accordingly entered, after reciting these proceedings, that the plaintiffs recover the amount so found, together with the costs as taxed.

The defendant gave notice of a motion for the special term, in June, 1869, to set aside such judgment and all subsequent proceedings, as irregular and void, on the ground that the lien having expired September 6, 1868, no judgment whatever could be entered in this action, in favor of the plaintiffs. An execution was issued, which showed that the plaintiffs advertised for sale the right, title and interest which the defendant had when the lien was filed.

The court, at special term, denied the motion, and the defendant appealed to the general term.

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Charles F. Doyle, for the appellant.

J. F. Crawford, for the respondents.

By the Court, HOGEBROOM, J. Under a somewhat similar statute in New York city, the Court of Appeals held, in *Freeman v. Cram*, (3 Comst. 305,) that a mechanic's lien only continued one year from the commencement thereof, and was not prolonged by a judgment against the owner of the property, obtained within the year. Such a judgment appears to have been obtained, in that case, against one Armeat, the original contractor and owner, who having died, this suit was instituted by way of *scire facias*, against the defendant, as subsequent owner and terretenant, Armeat having sold the premises to him, and he purchasing the same in good faith. The claimant's lien, if he had one, having thus expired on the 6th of September, 1868, over eight months before judgment was obtained in this action—for the provision for the continuance of the lien is substantially the same as in the New York statute—it is contended, on the part of the defendant, that the plaintiffs were not, at that time, viz., May 29, 1869, entitled to any judgment whatever. The remedies created in the mechanics' lien law are of a purely statutory and extraordinary nature, and the provisions for their enforcement must be strictly construed. (*Roberts v. Fowler*, 3 E. D. Smith, 632.) It authorizes a summary proceeding to obtain a judgment and to enforce the payment of claims due to contractors and laborers, and declares the court open at all times for the purpose of facilitating the collection or enforcement of such claims, (§ 6 of the act of 1854, p. 1086;) and claimants must take advantage of the facilities afforded them to recover and docket their judgments; and I think they must accomplish it during the life of their liens, in one year, or else they lose their claims

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against the property, so far as they depend upon the provisions of that act.

This statute of 1854, (*Laws of 1854, p. 1086,*) as amended by the laws of 1858, page 324, which amendment simply extends the provisions of the act to all the counties of the State, except New York and Erie, under which this lien was filed and proceedings commenced, authorizes the recovery of a judgment and the docketing thereof, and provides that the lien shall continue until the expiration of one year, unless sooner discharged, but that when a judgment is rendered therein, *within the year*, and docketed, it shall be a lien upon the real property of the party, to the extent that other judgments are a lien thereon. (*See § 20 of the act of 1854.*) There is no express provision in the act that judgment may be entered after the expiration of the year, and probably because one year was deemed sufficient time for a contractor or laborer to collect his claim, and to enforce it by judgment and execution. The proceeding is summary, and the court is open at all times to aid him, and with proper diligence it was probably supposed he could not fail to obtain his judgment within the year, if entitled to it.

No judgment having been recovered or docketed by the claimant, in this case, on or before September 6, 1868, it seems to me he was not at any time after that entitled to any judgment against the property described in the lien. (*Freeman v. Cram, 3 N. Y. Rep. 305, 309.*)

In this case of *Freeman v. Cram*, an action was brought by Freeman & Watt, the contractors, for the enforcement of a lien under the lien statute of 1844, and the question raised for the decision of the Court of Appeals was, whether the claimant had any lien under that statute, or whether it expired at the end of the year, and it was held by the court that it expired at the end of the year, and was not prolonged by an action commenced within the year, or by a judgment obtained within the year, and that a

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judgment subsequently obtained did not relate back to it and keep the lien alive.

The corresponding sections of the act of 1844, (under which this last case was decided,) and the act of 1854, (under which these proceedings were commenced,) in relation to the duration of the time, are as follows:

Act of 1844, § 3. The lien created by this act shall take effect from such filing and such service of the said notice, and shall continue in full force for the space of one year thereafter, &c.

Act of 1854, § 20. Every lien created under the provisions of this act shall continue until the expiration of one year, unless sooner discharged by the court, or some legal act of the claimant in the proceedings, &c.

The claimant, on the 29th of May, 1869, when the judgment was obtained in this action, was not, I think, entitled to any judgment whatever. He could not recover under the lien, as that had expired. (*Freeman v. Cram*, 3 *N. Y. Rep.* 305.) There being no lien, and the proceeding statutory and special, there would seem to be no foundation for the proceedings to foreclose. (*Beals v. Congregation &c.*, 1 *E. D. Smith*, 654. *Cronkright v. Thomson*, *Id.* 661, 670.) He could not, I think, use the proceedings commenced to foreclose the lien for any other purpose than such as the statute contemplates. (*Sinclair v. Fitch*, 3 *E. D. Smith*, 677. *Lewis v. Varnum*, *Id.* 690, *n.* *Foster v. Poillon*, 2 *id.* 556. *Quimby v. Sloan*, *id.* 594.)

The statute authorized him to proceed against the property on which he had acquired a lien, but not—at least not except in connection with such a lien—against the defendant personally; and he had no right, and the court no power to grant him the right, to change the nature of the proceedings. (*Sinclair v. Fitch*, 3 *E. D. Smith*, 677. *Lewis v. Varnum*, *Id.* 690. *Quimby v. Sloan*, 2 *id.* 594 and 609.)

It has been held in the Superior Court of New York, that the proceeding to foreclose a mechanic's lien is a pro-

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ceeding *in rem*, not *in personam*, and operates only as a foreclosure of a lien, and not as an action for the collection of a debt. (*Randolph v. Leary*, 3 *E. D. Smith*, 637. 4 *Abb. Pr. Rep.* 205.) These actions, it is said, are purely proceedings *in rem*, founded on statute, and can be used for no other purpose, when this purpose fails. (*Quimby v. Sloan*, 2 *E. D. Smith*, 609. *Cronkright v. Thompson*, 1 *id.* 661. *Cox v. Broderick*, 4 *id.* 721.)

This was a proceeding *in rem* (primarily at least) against specific property subject to this lien, which proceeding against the property existed by virtue of the lien created by statute. If the lien expired before his judgment could be had, then it is claimed, with much force, that the right to recover the property failed, and no judgment whatever could be had.

If the lien had expired on September 6, 1868, being one year after it was created, then on May 29, 1869, when the judgment was obtained, there was no lien; consequently, it is contended no judgment could be rendered against the defendant, or the property in question, as the foundation for the proceedings to foreclose was swept away. (1 *E. D. Smith*, 654, 661, 670. 2 *id.* 594, 609.) "Having called the defendant into court in a peculiar mode prescribed by statute for a particular purpose, only applicable to a specified claim, if the lien fails the plaintiff cannot convert his proceedings into an ordinary action for the recovery of money upon a personal contract, and insist upon the defendant's personal liability." (*Quimby v. Sloan*, 2 *E. D. Smith*, 609. *Bailey v. Johnson*, 1 *Daly*, 61.)

It would seem to be beyond doubt, under section 20 of the act of 1854, and the decision in 3 *N. Y. Rep.* 305, that this lien had failed on May 29, 1869. The judgment, it would seem, could only sell the right, title and interest of the defendant when the lien was filed, not when judgment was docketed. (Sections 11 and 12 of the act of 1854, p. 1089. *Smith v. Corey*, 3 *E. D. Smith*, 642. *Doughty v. Dev-*

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lin, 1 *id.* 625. *Lenox v. Trustees of Yorkville*, 2 *id.* 673. See also 1 *id.* 644; 2 *N. Y. Rep.* 247.)

But the plaintiffs claim that although their mechanics' lien has ceased to be operative by reason of failing to foreclose within a year, still they can use the proceedings they have commenced, to foreclose after the expiration of the lien, as an action on contract to recover the claim (which the lien secured) and obtain a judgment which binds the defendant's estate generally from the day of its docketing; or, in other words, that they can abandon their lien, and recover a personal judgment against the defendant, which will bind his property as if the action had been originally commenced on the simple contract, irrespective of the lien. Their theory is based on section 14 of the laws of 1854, page 1090, which says: "After issue joined, the action shall thereafter be governed and tried in all respects as upon issue joined and judgment rendered in other actions arising on money demands upon contracts in said court, and the judgment enforced as prescribed by section 11 of said act." But it must be borne in mind that this same language was used in section 8 of the laws of 1851, page 955, regulating mechanics' lien in New York city; and yet the court held, in *Quimby v. Sloan*, (2 *E. D. Smith*, 609,) and *Sinclair v. Fitch*, (3 *id.* 691,) both decided under the law of 1851, section 8, page 755, that notwithstanding that section 8 of 1851, the proceedings could not be used to recover a personal judgment against the defendant. That if the lien had expired or failed, no judgment whatever could be rendered for the plaintiff, and that the plaintiff could not convert his proceedings into an action for the recovery of money upon a personal contract, and insist upon a personal liability. Those cases were where the contractor sued the owner and established his claim, but failed to establish any lien.

Section 8 of the laws of 1851, page 955, under which *Quimby v. Sloan*, (3 *E. D. Smith*, 607;) *Sinclair v. Fitch*,

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(3 *id.* 691;) and *Randolph v. Leary*, (*Id.* 637,) were decided, reads as follows: "After issue joined, the action shall be governed, tried and judgment thereon enforced, in all respects, in the same manner as upon issues joined and judgment rendered in all other civil actions for the recovery of money, in the said court."

So, it will be perceived, almost the very identical language is used in section 8 of the laws of 1851, page 955, as is used in section 14 of the laws of 1854; and the court held, in 2 *E. D. Smith*, 609, that section 8 of the laws of 1851 does not allow a personal judgment against the defendant. "The judgment is designed to enforce the lien. This proceeding is called a proceeding to enforce the lien. (*Sections 6 and 11, act of 1854.*) The execution to be issued is for the enforcement of the claim. (*Section 11, act of 1854.*) By the first section the extent of the lien is confined to the right, title and interest of the owner existing at the time of filing the notice, and the form of the judgment and execution will require adaptation to this limitation. And when the legislature, in the act in question, has likened the proceedings herein to proceedings upon issues joined and judgments rendered in other civil actions for the recovery of moneys, they must be deemed to mean civil actions for the recovery of money secured by liens upon property in some sort resembling the liens contemplated by this statute." (*Doughty v. Devlin*, 1 *E. D. Smith*, 644.)

Again, in *Cronkright v. Thomson*, (1 *E. D. Smith*, 663,) decided under section 8 of the laws of 1851, it is said the proceeding is not an action to recover money from the defendant personally, for goods sold to a contractor, or labor done for him. It is instituted to foreclose a lien upon property. It is a proceeding *in rem*, and the first step is to prove a lien; for without that there is no foundation for the proceeding."

Section 20 of the laws of 1854, page 1091, by providing

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that the judgment, if obtained within the year, shall become a lien upon the real estate of the party, to the extent that other judgments are, would seem to intend to exclude a judgment obtained subsequently. It would seem to intend that no judgment can be rendered after the year, because it can only be a lien provided it is obtained in the action within a year. No judgment was rendered in this action until eight months after the lien had expired; that is, eight months after the year during which the lien existed had expired; or, in other words, the lien was filed September 6, 1867; it expired September 6, 1868, and judgment was rendered May 29, 1869, eight months after the expiration of the year and lien.

Then these conclusions from the decisions would seem to be warranted:

1. The lien expired September 6, 1868.
2. The judgment obtained May 29, 1869, did not relate back and authorize a sale, or prolong the lien.
3. If there was no lien on May 29, 1869, because it had expired, then there was no lien to foreclose, and could be no valid proceeding for that purpose, and no judgment could be rendered in favor of the plaintiff.
4. No personal judgment could be rendered in favor of the plaintiff, in these proceedings.
5. If the lien has expired, then no right exists to sell the property in question, as a judgment does not resuscitate it, and the judgment within a year only determines the amount of the lien and the order of foreclosure. The judgment does not take effect, as in ordinary cases, from the time and by force of its docketing, but rather by force of the lien. The judgment does not make the lien. That exists by the notice as filed. The judgment simply determines the amount, and orders sale; hence if there be no lien there is nothing to determine, and the docket determining nothing, a judgment is irregular and void. Hence, there being no lien existing, the judgment cannot

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restore it, and the judgment rendered not being itself an authorized lien, under the statute, against the defendant's property, cannot be upheld and enforced for any other purpose.

If the plaintiffs have any claim against the defendant, and that claim exists, they must proceed in the ordinary way to enforce it; and the defendant being perfectly solvent, worth, as stated in his affidavit, some \$24,000, over and above debts, there is no hardship in compelling them so to do, and no equity can intervene to prevent it.

The judgment does not become a lien against the property of the defendant by force of its being recovered and docketed, but simply determines the amount of the lien and directs a sale of the right, title and interest of the defendant in the property when the lien was filed. (*See Freeman v. Cram*, 3 Comst. 308, 309.)

The lien of a judgment on contract and one on mechanics' lien are different, and not connected with each other, only so far as a judgment and sale are made, under the lien, within a year. The lien is not so much by force of the judgment as of the mechanics' lien; the judgment does not give birth to the lien, but only provides the means to enforce it. The lien exists by virtue of the statute, and independently of the judgment.

The lien does not take effect when judgment is docketed, but relates back to the time when the mechanic's lien is filed. Hence, if, when the judgment was docketed, the lien had expired, then there was no lien on the defendant's property which the judgment could sell or relate back to. There was no lien by force of the judgment simply, for that created no lien, and bound no property, unless the mechanics' lien was in force. There was then a want of power in the court to order the judgment; that is, the court had no jurisdiction to enforce the lien, as the lien had already expired. In such cases a motion to set

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aside and vacate the judgment is proper, and the party is not driven to an appeal from the judgment. The judgment being not authorized by law or the statute in question, and not in conformity to it, I think the remedy by motion was proper. (*See* 13 *How. Pr.* 43. 17 *Abb.* 36, *n.* 12 *id.* 331. 40 *Barb.* 408, 415.)

“The objection to the judgment is not to its irregularity, but that it is altogether unauthorized, and void or voidable for want of authority in the court to render it; in such cases the judgment should be vacated, on motion.” (*See* 12 *Abb.* 331, 333.) The defendant was not bound to appear on the trial and raise this question. As it strikes at the root of the whole proceedings, it is a jurisdictional defect, which can be taken advantage of at any stage of the proceedings. It is not a question of irregularity simply, which the party could waive by not raising it on the trial, but it is a question of want of power in the court to order judgment, as the foundation of the judgment had been swept away. The lien which founded the action and the plaintiffs’ right to recover, was of no effect and validity. It had expired. Consequently no judgment could be rendered under the lien. It could not be used as a foundation for the execution issued upon it. (*Quimby v. Sloan*, 2 *E. D. Smith*, 609. *Cronkright v. Thomson*, 1 *id.* 661. *Cox v. Broderick*, 4 *id.* 721.) Nor to recover upon contract the debt which the lien professed to secure. So the want of power is apparent. The defendant’s remedy, by motion, to vacate a judgment without authority, seems to be proper. The judgment does not conclude him, as it is without jurisdiction. It has been held, in various cases, that where a judgment is void or voidable, the proper way is to move to set aside or vacate it. (24 *N. Y. Rep.* 72. 6 *Hill*, 242. 6 *Cowen*, 393. 3 *id.* 68. 22 *How. Pr.* 265.)

Upon the authorities quoted, and a proper construction

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of the statute in question, I think the motion should have been granted, and the judgment and subsequent proceedings vacated and set aside, with costs.

The order appealed from should therefore be reversed, with costs.

[ALBANY GENERAL TERM, December 6, 1869. *Miller, Ingalls and Hogeboom*, Justices.]

PRUYN vs. BRINKERHOFF.

Whether respondents in an appeal by an executor and legatee from a decree of the surrogate, admitting a will to probate, will not waive the right to object to the executor's ability to appeal, by their default in not answering, and in allowing an order to be entered that the appeal be heard *ex parte*? *Quære.*

A gift, by will, to an executor, of a sum of money as a compensation for his services as such, over and above his commissions, stands in the same position, and partakes of the same character, as the commissions of an executor. It is not an absolute gift, and not such a devise or legacy as becomes forfeited under the statute, (2 R. S. 65, § 50,) by the legatee becoming a subscribing witness to the execution of the will.

Nor are a devise of real estate in trust to make partition, and for various special purposes, or a gift of personal estate in trust, forfeited by the devisee or legatee becoming a subscribing witness.

Whether the above statutory provision is superseded and amended by section 899 of the Code of Procedure? *Quære.*

MOTION to dismiss the appeal of Robert H. Pruyn, as executor and legatee, from a portion of the decree of the surrogate of Albany county, admitting to probate the will of Blandina Dudley, deceased, by which counsel fees were awarded to counsel appearing in support of, and in opposition to, the will.

The appellant was appointed executor by a codicil. He was a subscribing witness to the will, and was examined as such under a commission, while in Japan, and testified

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to the execution of the will, without having any knowledge of the existence of the codicil. By the will he was appointed a trustee of the real estate, to make partition, and for various special purposes. He was also a legatee in trust, and the sum of one thousand dollars was bequeathed to him as a compensation for his services as executor, over and above his commissions.

The respondents were duly served with a petition of appeal, on the 22d of June, 1867, and were in default for not answering; an order having been entered, on the proper affidavit, that the appeal be heard *ex parte*, under rule 44.

J. F. Seymour and A. Lansing, for the appellant.

J. Forsyth and H. Smith, for the respondents.

By the Court, MILLER, J. There may, perhaps, be some question whether the respondents have not waived the right to object to the executor's ability to appeal, by their default in not answering, and in allowing an order to be entered that the appeal be heard *ex parte*. But passing by the question of waiver, I think the motion to dismiss the appeal to the Supreme Court, from the surrogate's decree, must be denied.

By the statute, (2 R. S. 66, § 55,) the right of appeal is given to any devisee or legatee named in the will of the testator. The appellant is, I think, both *a devisee and a legatee in trust*, under the will; and unless the devises and bequests to him are forfeited by the provisions of 2 Rev. Stat. 65, § 50, he has a clear right of appeal. The statute last cited does not, I think, deprive the appellant of such right, and he is not such a devisee or legatee as is deprived of that privilege. The term "beneficial," in that section, has been held not to apply to all kinds of

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devises and bequests, and none but such as are comprehended within this class are avoided. (*McDonough v. Loughlin*, 20 Barb. 244, 245.) The devise of one thousand dollars was bestowed as a compensation for services to be rendered as an executor; and it stands in the same position, and partakes of the same character, as the commissions of an executor. It was not an absolute gift, and not such a devise or legacy as becomes forfeited under the statute. Nor are the devises in trust forfeited within the provisions of the statute in question. This principle is expressly held in the case cited, and I think it is decisive upon the question now submitted to our consideration.

It is urged that the statute is superseded and amended by section 399 of the Code, and that this should be construed in connection with 2 *Rev. Stat.* 65, § 50; but as there are other grounds upon which this motion should be denied, it is not essential to enter upon a discussion of the question how far this provision of the Code, designed as it was, to change the old common law rule which precluded all persons who were interested, from testifying as witnesses, modifies or affects the statute.

The motion to dismiss the appeal must be denied, with ten dollars costs.

[ALBANY GENERAL TERM, September 16, 1867. *Miller, Ingalls and Hogeboom*, Justices.]

ABIGAIL W. EATON, adm'x, and others, adm'rs of Josiah Eaton, deceased, vs. JOHN P. ALGER and others.

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63h	415

In an action upon a promissory note, brought since the Code, the defendant has a right to prove that the plaintiff is not the real owner of the note sued on.

If the plaintiff is not a regular indorsee or holder, but holds the note merely as agent for the payee, against whom the defendants claim to have a good defense, they are interested in questioning the plaintiff's title, and have the right to show his want of interest.

If the plaintiff is not the real party in interest, that, of itself, under section 111 of the Code, is a bar to all further proceedings in the action, and a complete defense, as against the plaintiff.

The law of this State no longer permits actions to be prosecuted in the name of nominal plaintiffs. The moment the fact appears that the plaintiff is not the real party in interest, the action is ended; no matter what is the character of the instrument on which it is founded; whether negotiable or not; or whether the defendant has or has not, any defense to the indebtedness.

A PPEAL from a judgment entered upon the verdict of a jury.

The action was brought in 1858, by Josiah Eaton, then in life, against the defendant John P. Alger, and Wilks S. Alger, since deceased, on a promissory note, purporting to be made by the defendant John P. Alger, and indorsed by Wilks S. Alger, for \$629.75.

The defendants answered separately, and set up the same defenses, namely: First, that the note was void for usury taken by the payee, Clark; and, secondly, that the plaintiff was not the real party in interest, but that the note, at the time of the commencement of the action, belonged to and was the property of Ira M. Clark, the payee in said note, who was the real party in interest in the action.

The action was tried at the Saratoga circuit, in May, 1860, before Justice JAMES and a jury, where the plaintiff was nonsuited on both of the grounds set up in the answer in defense, and judgment was entered up for the defendants, on the verdict, for costs, which was afterwards, on

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appeal, affirmed by the general term in the fourth district, but which was subsequently, on appeal, reversed by the Court of Appeals, and a new trial granted. Pending the appeal in the Court of Appeals, the original plaintiff, Josiah Eaton, died, and the present plaintiffs, his administrators, were duly substituted in his place and stead; and the defendant Wilks S. Alger having died, his executors, J. P. Butler and Elihu Wing, were duly substituted defendants in his place and stead.

The action was again tried at the Saratoga circuit, in January, 1868, before Justice ROSEKRANS and a jury.

On the trial the plaintiffs proved the making and indorsing of the note, and rested. The defendants then offered to show that the plaintiffs' intestate, Eaton, said to the defendant John P. Alger, before this suit was brought, that he had no interest in, or title to, the note, but was the mere agent of Clark. This was objected to as irrelevant and incompetent, and because the defendants were not in a position to question the title of the plaintiffs to the note. The objection was sustained, and the defendants excepted.

The defendants then put the following receipt in evidence: "Recd. of Ira M. Clark a note against J. P. Alger, indorsed by W. S. Alger, for six hundred and twenty-five 75-100 dollars, which I agree to account for on demand. Aug. 24th, 1858. Josiah Eaton."

And in connection therewith again offered the evidence above stated, which was again objected to and excluded, and the defendants excepted.

The defendants then offered to show that it was not designed by the parties that the title to the note, or any interest therein, should vest in Eaton; that he only took it as agent. This was objected to, the objection sustained, and the defendants excepted. The defendants next offered to show that Clark claimed to own the note, and said that Eaton had no interest in it. This was objected to,

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the objection sustained, and the defendants excepted. The evidence being closed, the defendants' counsel requested the court to charge the jury that the receipt on its face, unexplained, showed the note in suit to be the property of Clark; and that Eaton had no right or title to it, at the commencement of this action. The court refused so to charge, and the defendants excepted. The plaintiffs had a verdict for the amount of the note and interest, upon which judgment was entered, and the defendants appealed.

A. Pond, for the appellants.

The judge erred in excluding the evidence offered to show that the title to the note in suit, at the commencement of the action, was in Clark, the payee, and not in Eaton, and that the latter had no interest therein.

I. By the Code (§ 111) the law is now universal, that unless in certain excepted cases mentioned in section 114, of which this is not one, "every action must now be prosecuted in *the name of the real party in interest*," and the decisions of the court are to that effect. (*Edwards v. Campbell*, 23 Barb. 423. *Killmore v. Culver*, 24 id. 656. *Lounsbury v. Depew*, 28 id. 44. *James v. Chalmers*, 2 Seld. 209, 215. *Nelson v. Eaton*, 26 N. Y. Rep. 410, 413, 414. *Clark v. Phillips*, 21 How. 87. *Byxhie v. Wood*, 24 N. Y. Rep. 609.)

II. The cases of *City Bank v. Perkins*, (29 N. Y. Rep. 554,) and *Brown v. Penfield*, (36 id. 473,) have no application to this case. In each of those cases there was a formal transfer of the note in question, and the only contest was in regard to whether an actual transfer, good in form and for a valuable consideration, could be impeached by the defendants, by showing that the transfer was not good as against the party transferring, and it was properly held that it could not. But that was far from holding that an agent, having no transfer at all of the note to himself,

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and no interest in it whatever, and, so far as appears, without any authority from the owner and party in interest to sue, either in his own name or that of the owner, can, under the Code, maintain an action on a negotiable promissory note, payable to bearer. I maintain that such a case is directly within the prohibition of section 111 of the Code. Nor can the defense be excluded on the principle enunciated in *Gage v. Kendall*, (15 *Wend.* 640.) That was a case before the Code, and the court say, (p. 641 :) "It is true, as contended for by the plaintiff in error, that suits should be brought by the persons having the legal interest in contracts; but in the case of negotiable paper, a suit may be brought in the name of a person *having no interest in the contract.*" And the court assign the reason: "He may sue as *trustee* for those interested." Now the Code, on this subject, has abolished all but "express trusts," and a person who has a promissory note payable to bearer, in his possession, simply as an agent of the owner, and without any interest therein himself, and without, so far as appears, any instructions to bring a suit on it in the name of any one, is not the "trustee" of an "express trust," within the meaning of the statute, and therefore not authorized by virtue of such possession, merely, to bring a suit thereon in his own name.

The design of section 111 of the Code manifestly was to adopt the equity rule as to who might sue, as applicable to all cases, and no exception was made in favor of the holder of negotiable paper; and it would be a repeal *pro tanto* of this statute to so construe it as to engraft such an exception upon it. The language of Judge Wright, in his opinion in this case, when a new trial was granted by the Court of Appeals, may be broad enough to repeal section 111 of the Code, as contended for by the plaintiff, but I submit that so far as the decision went in regard to the question actually involved, it was a palpable repeal of that principle of the common law, hitherto regarded as

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well settled, that excludes all parol evidence to add to or vary a written contract; and that is sufficient for one opinion of a judge to effect, at one time, without attributing to it the further consequence of repealing a plain statutory enactment, when the question as to its application to the case was not involved in the appeal. The Court of Appeals may possibly, when the question comes properly before them, conclude to repeal section 111 of the Code, so far as it applies to suits upon negotiable paper; but until that time arrives, and the Court of Appeals actually so decides, I respectfully submit that the defendant is entitled to the benefit of the statute as it stands; and which, in the language of Judge Welles, in *James v. Chalmers*, (2 Seld. 215,) is this: that “under the Code of Procedure, if it appears that the plaintiff is not the real party in interest, it is a bar to the action, and no further defense is necessary.”

The defendants offered evidence to show just this fact, and it was excluded, and an exception was taken, and it must now be assumed that sufficient evidence would have been given to prove the issue in favor of the defendants, had it been admitted. The exclusion was therefore erroneous, as such fact constituted a flat bar to the action.

III. But suppose the evidence offered and excluded did not tend to show a full defense to the action, still its exclusion was error. It was competent, in order to make the declarations of Clark, the payee, which were proved, evidence in chief, instead of being merely impeaching evidence. If Clark was the party in interest, and the plaintiffs were his trustees, merely, then the declarations of Clark were admissible as evidence in chief on the trial. Excluding proof of the essential fact of interest, prevented the defendants from that benefit from Clark's declarations they were entitled to, and was therefore error. (*James v. Chalmers*, 2 Seld. 215. *Booth v. Swezey*, 4 id. 276, 280. *Gardner v. Barden*, 34 N. Y. Rep. 435.)

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IV. But the judge erred, in any event, in sustaining the objections to the evidence offered by the defendants to show that the plaintiff was not the party in interest in the action. One of the objections, which was sustained by the judge, was "that the defendants were not in a position to question the title of the plaintiffs to the note in suit." This was manifestly erroneous, and this decision entirely foreclosed the defendants from making any defense whatever, based on the question of want of title in the plaintiff to the note in suit. It was tantamount to holding that the defendants occupied such a position that they were estopped from contesting the title of the plaintiff to the note in suit, on any ground whatever. Under that ruling, evidence to show a fraudulent holding or possession of the note by the plaintiff was inadmissible. All evidence tending in any degree to impeach the title of the plaintiff to the note in suit became inadmissible; and if such proof was open to the defendants for any purpose—that is to say, for the purpose of showing a *mala fide* title—then the decision was erroneous, and the verdict founded thereon must be set aside. Under such circumstances the offer of additional proof, if that was necessary to make the defense perfect, would have been but an idle ceremony, and was not necessary, in order to make the exception available to the defendants. (*Requa v. Holmes*, 16 N. Y. Rep. 193.) The verdict should therefore be set aside and a new trial granted.

E. Cowen, for the respondents.

I. The offers of evidence made by the defendants on the trial were all directed to a single object, that of proving that Eaton was not the real party in interest, and therefore not competent to sustain the action. It is true, that, in one of the offers, the defendants, casting around for some ground of admissibility, say that one object of the evidence was to "authorize proof of the declaration of Clark show-

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ing that the note was usurious and void." This offer was properly excluded, for three reasons. 1. The offer was not broad enough. It should have been coupled with the declaration of Clark, which the defendants proposed to prove. There was no offer to prove that Clark had said, (as in fact he had not,) that the note was usurious and void. The defendant simply attempted to introduce this evidence to "authorize proof" of Clark's declarations, if they should happen to discover that he had made any. The Court was not bound to let in a flood of otherwise irrelevant evidence to meet a case that might never arise. 2. The sufficiency of the evidence was a question for the sound discretion of the judge who tried the cause. He may have thought that a charge made by Eaton against Clark was not of itself sufficient to let in proof of Clark's declarations as to the validity of a note which he had legally transferred to another, and if so, this court will not review his decision. 3. But it is sufficient that the defendants, in fact, had the full benefit of Clark's declarations. He was a witness for the plaintiff, related the entire history of the transaction claimed to be usurious, and was fully cross-examined by the counsel for the defendants. And moreover, the defendants gave in evidence, without objection, all the declarations of Clark concerning the validity of the note that they desired.

II. The defendants' counsel requested the court to charge that the receipt given by Josiah Eaton to Clark, on its face showed that Clark was the owner of the note in question, and that Eaton had no title to it. The court declined so to charge, and its refusal was unquestionably correct. Inasmuch as the Court of Appeals had decided in this very case, the exact reverse of the proposition, the request must be considered rather as an exhibition of remarkable coolness under adverse circumstances, than as containing the views even of the defendants' counsel upon this point.

III. This brings us to the real question in this case,

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namely, whether or not the defendants should have been allowed to show, for the purpose of defeating this action, that the plaintiffs were not the true owners of the note in suit. The proposition we propose to establish is, that under the Code of Procedure, the indorsee of a note or the holder of a note payable to the bearer or indorsed in blank, may sustain an action upon it, although not in fact the owner, nor, as between himself and the owner, entitled to the proceeds when collected. 1. That this was the rule in this State before the Code, will not be denied. The cases are numerous, holding that the owner of a note payable to bearer or indorsed in blank, can make any one whom he pleases the holder of such note, and that an action can be sustained by such holder upon his apparent title. (*Lovell v. Evertson*, 11 John. 52. *Gage v. Kendall*, 15 Wend. 640.) 2. But it will be claimed by the defendants that this rule was changed by the 111th section of the Code of Procedure. It is proper that we should apply to this statute the usual rules of interpretation where the common law is altered by an enactment of the legislature. We are to inquire into the state of the law before the passage of the act, the inconveniences to be remedied, and in what respects the former law has been changed by the language of the statute. We have seen that before the Code an action could be sustained by one having an apparent title to negotiable paper. If this was the evil or inconvenience which the 111th section of the Code was intended to remedy, then the rule which the defendants seek to establish may be correct, but not otherwise. 3. The sole object of the 111th section of the Code was to abrogate the common law rule which compelled the assignee of a chose in action to sue upon it in the name of the assignor. The rule itself grew out of the old common law doctrine that a chose in action was not assignable. But these rules never applied to negotiable paper, for, by reason of the use of the words "order" or "bearer," the bill or note

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was not considered a contract to pay the amount to the payee alone, but to any one whom he should designate in writing, in the one case, or who should be in possession of the contract at its maturity, in the other case. Thus when, even by inadvertence, negotiable paper payable to order was transferred without indorsement, it was held that the action must be brought in the name of the assignor. (*Franklin Bank v. Raymond*, 3 *Wend.* 69. *Savage v. Bevier*, 12 *How. Pr.* 166.) 4. As to all causes of action, with this single exception of choses in action not negotiable, the rule was precisely the same at law as in equity, namely, that the action must be brought in the name of the real party in interest. But as we have seen, the apparent owner of a bill or note was considered the "party in interest," within the meaning of this doctrine; and this was rather a rule of evidence than of practice, the courts holding that an actual indorsement, or actual possession of a bill or note, payable to bearer or indorsed in blank, was conclusive evidence of ownership, until it was contradicted by some one who had an interest in showing the title to be elsewhere. Thus if the note was obtained by fraud or in bad faith, so that the holder had no title, and the debtor might be obliged to pay the true owner, that was a good defense. But if the true owner acquiesced in the title of the holder, so that the payment would be a bar to another action, it was held that he who owed the debt and was bound to pay it to some one, could not raise the question of title. (See *Lovell v. Evertson*, and *Gage v. Kendall*, above cited.) 5. Now there is not a particle of proof that the legislature, in passing the 111th section of the Code, intended to change these long settled rules of law with reference to negotiable paper. Their object was to abrogate a foolish and inconvenient rule of practice, which was far behind the age, and not to do away with a convenient and salutary rule of evidence, so limited that it could do no possible harm. They desired to relieve the parties to assignments from a

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hardship, not to benefit defaulting debtors; to "abridge and simplify" the rules of practice, not to add to the number of technical defenses. 6. To give to this section the broad construction contended for by the defendants' counsel, would entirely do away with a class of actions which are as common since the Code as before, and to which no court has as yet thought fit to apply this rule. I allude to actions for the recovery of damages for injuries to personal property, where the plaintiff's right of action is founded upon mere possession. In such actions the plaintiff is not the real party in interest, within the rule sought to be established in this case; that is to say, he is not entitled to retain the proceeds of the action, but must pay them over to the owner of the property. His right of action depends upon an ancient rule of law, that his possession is evidence of ownership, and that the defendant, who is a wrong-doer, with no interest in the title, shall not contradict it. We have seen that this is the precise ground upon which the apparent owner of negotiable paper could bring an action upon it, and if the Code has abrogated the rule in one case why not in the other? It is absurd to say that under this section of the Code, Mr. Eaton could have sustained an action for the conversion of this note, but not for the collection of it. So far as this question is concerned, the two cases are exactly analagous. In both the action is founded upon possession, in both the proceeds belong to the real owner and not to the plaintiff. Those who hold that the Code, without referring to either of these cases, takes away the right of action in one of them and not in the other, are bound to show some reasonable distinction between them. 7. I have endeavored to show that the decision at the circuit was right on principle. But the point has been expressly decided by the highest authority of this State in accordance with the views above set forth. In the case of the *City Bank of New Haven v. Perkins*, (29 N. Y. Rep. 554,) the question arose whether

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or not in an action upon a bill of exchange, the defendant might set up that the plaintiff, who was apparently a regular indorsee, was not the lawful owner of the bill, and the court held that he could not. The court in that case established the rule, that in such a case the defendant has no right to inquire into the title of an apparent owner, except for the purpose of showing that it was obtained fraudulently or in bad faith. The court quote the case of *Gage v. Kendall*, above cited, approve its principle, and say that it applies in full force to the case before them. This court will not attempt to overrule that decision, and thereby enable the defendant in this action to entirely escape the payment of an honest debt.

The ruling of the court below was in all respects correct, and should be affirmed.

By the Court, JAMES, J. The real question in this case is, whether the defendant should have been allowed to prove that the plaintiffs were not the real owners of the note in suit.

As the Code stood when this action was commenced, every action was required to be brought in the name of the real party in interest, except as otherwise provided. (*Code*, § 111.) No other provision covered a case like this. It would therefore seem very clear, that a defendant, on such an issue made by the pleadings, would have the right to show that the plaintiff was not the real party in interest, particularly if he had pleaded a defense in the action good as against such pretended real party. The plaintiffs, however, insist that notwithstanding this provision of the Code, the indorsee of a note, or the holder of a note payable to bearer or indorsed in blank, may maintain an action upon it, although not in fact the owner, nor, as between himself and the owner, entitled to the proceeds when collected. That such was the rule before the Code, is conceded; and the argument is, that

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it was abolished by the Code; that the codifiers and legislature so intended. In their report to the legislature the codifiers said, "the rules respecting parties in the courts of law differ from those in the courts of equity; the blending of the jurisdiction makes it necessary to revise those rules to some extent; in doing so we have had a threefold purpose in view: 1st. To do away with the artificial distinctions existing in the courts of law, and to *require* the real party in interest to appear in court as such. 2d. To require the presence of such parties as are necessary to make an end to the controversy; and 3d. To allow, otherwise, great latitude in respect to the number of parties who may be brought in. * * * * The true rule undoubtedly is that which prevails in the courts of equity, that he who has the right is the person to pursue the remedy. We have adopted that rule." This section, now 111, was adopted by the legislature precisely as submitted by the codifiers, showing that they approved the reasons given by the codifiers for its adoption. It is therefore quite immaterial what was the rule previous to the Code, if thereby the legislature intended to, and did, change the rule, by express enactment. That they did so we think clear, from the language of the statute and the reasons for its adoption. In their reasoning the codifiers alluded to the existing rules and the necessity for a revision, one purpose of the proposed change being to *require* the real person in interest to appear in court as such, followed by an act providing that "every action must be prosecuted in the name of the real party in interest." This reasoning, and this enactment, seem too plain for misconception. The act is emphatic; it uses the Saxon word "must," (a verb which has not yet been twisted by judicial construction, like the words "may" and "shall," into meaning something else,) to place beyond doubt or cavil what it intended.

The courts have heretofore held that an action could

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not be maintained unless in the name of the real party in interest. In *Killmore v. Culver*, (24 Barb. 656,) in an action on a note, it was held "that the plaintiff, who held the note merely for prosecution, could not maintain an action, because not the real party in interest." In *Clark v. Phillips*, (21 How. 87,) the court said: "This action on a promissory note cannot be sustained, because not brought by the real party in interest." And in *James v. Chalmers*, (2 Selden, 215,) it was said that "under the Code of Procedure, if it appears that the plaintiff is not the real party in interest, it is a bar to the action, and no further defense is necessary."

This covers the entire ground of this case, and shows clearly that the judge at circuit erred in excluding the evidence offered.

But it may be said that the remark in *James v. Chalmers* was not necessary to a decision of the case. If this is conceded, still, as the opinion was concurred in by seven of the eight members of the court, without any objection to the above remark, it illustrates how that section of the Code was understood by the bench.

The importance of the rule enacted by the Code is illustrated in this case. One defense set up is usury. It was charged against the payee of the note, the alleged real party in interest. It was sought to establish this defense by proof of his admissions and declarations; but as he was not a party to the action, they were excluded as hearsay, within the rule of *Paige v. Cagwin*, (7 Hill, 361.) Had the action been in Clark's name, his declarations would have been admissible as evidence in chief; and if the real party in interest, he should not be permitted, by a nominal transfer, to defeat the other party in the use of his own admissions and declarations. It was earnestly insisted that this question had been expressly decided in *City Bank of New Haven v. Perkins*, (29 N. Y. Rep. 554,) and *Brown v. Penfield*, (36 id. 473.) But neither case is

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in point. The question in each was whether an actual transfer, good in form, and for a valuable consideration, could be impeached by the defendant showing that the transfer was not good as against the other party, and the court held that "nothing short of *mala fides*, or notice thereof, would enable an indorser or acceptor of negotiable paper to defeat an action brought upon it by one who is apparently a regular indorsee or holder, especially when there is no defense to the indebtedness; that as to anything beyond the *bona fides* of the holder, the defendant who owes the debt has no interest; it is sufficient if the plaintiff's title is good as against the defendant."

In this action we are to presume, from the offer, that the plaintiff was not a regular indorsee or holder; that he held the note apparently as agent for the payee, against whom the defendants claimed a good defense. In this view the defendants were interested in questioning the plaintiff's title, and had the right to be heard upon that point.

The question is not whether there was proof showing that the plaintiffs were not the real parties in interest, but whether the defendants could give evidence to prove such allegation. If the defendants could make such proof, the case came within the principle of the two cases last above cited; it would impeach the *bona fides* of the plaintiff's possession, coupled with a legal defense pleaded, which the defendants should have an opportunity to establish, in an action by the real owner.

But upon the broader ground, if the plaintiffs were not the real parties in interest, that of itself, under section 111 of the Code, was a bar to all further proceedings in the action, and a complete defense as against the plaintiffs. The law of this State no longer permits actions to be prosecuted in the name of nominal plaintiffs; the moment that fact appears the action is ended, no matter what the character of the instrument on which it is found-

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ed; whether negotiable or not; or whether the defendant has, or has not, any defense to the indebtedness.

For these reasons the learned judge erred in not allowing the defendants to make the proof offered, and a new trial should be granted; costs to abide the event.

[ST. LAWRENCE GENERAL TERM, October 6, 1868. *James, Rosekrans and Potter*, Justices. *Bookes, J.*, having been counsel, took no part.]

 McANDREWS vs. SANTEE.

A mere general exception to a judge's charge, where there is more than one point in such charge, and any portion of it is unexceptionable, is of no avail, if there is nothing to show to which part or proposition in the charge it is intended to apply.

Where wood is sold subject to inspection and measurement by a railroad inspector of wood, the purchaser is entitled to have the same actually measured by such inspector, or to have something done which will be equivalent to a measurement. He is not bound by the mere guess, or loose estimate by the eye, of such inspector, as to the quantity.

On the trial in the county court, of an action on a contract for the sale and purchase of wood, evidence was given to show that both the defendant and his witness stated the contract differently, then, from what they had previously stated it on the trial of the cause before the justice; the difference in the two statements being quite material upon the merits of the controversy, to wit, the quantity of wood to be paid for by the defendant. *Held* that the evidence was properly admitted, it being, as to the defendant himself, in the nature of admissions or declarations by a party, and principal evidence against him, upon the issue; and also competent as impeaching evidence against him or his witness.

APPEAL from an order of the county court of Steuben county, denying a motion for a new trial.

The action was brought to recover the purchase price of a quantity of wood, sold and delivered to the defendant. On the trial in the county court, the defendant and another person (his son) were examined as witnesses for the

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defense, and testified that by the terms of the agreement, the wood was sold subject to inspection and measurement by the wood agent of the Erie Railway Company. On cross-examination, each witness stated that he was a witness for the defendant on a previous trial of the action before a justice of the peace, and had then stated that the wood was sold subject to the inspection and measurement of such wood agent.

The defendant having rested, the plaintiff's counsel offered to prove that each of said witnesses, on the former trial, in giving his version of the terms of the agreement, omitted to state that the wood was sold subject to such inspection and measurement. An objection to this evidence as improper and immaterial was overruled, and the evidence received. George W. Smith, the railway wood agent, being examined as a witness for the defendant, testified that he measured the wood; that it was piled in ranks; that he measured the length of the ranks with a tape line, and the height and width with his eye; that that was his usual custom; and that he had thus measured many thousands of cords.

The judge, among other things, charged the jury that "they were to determine, from their experience, observation and knowledge, whether Smith, after measuring the length of the ranks with a line, and the height and width with his eye, with all his experience and practice in measuring wood, did in fact, or could, correctly measure the wood in that way; that the plaintiff was entitled to an actual measurement, or its equivalent, and would not be bound by any estimate of the railroad inspector, unless the jury were of opinion that his eye was, upon a question of measurement, as reliable as a measuring rod." The defendant excepted to the charge, generally.

The plaintiff recovered a verdict. The defendant moved for a new trial, upon a case; and the motion being denied, he appealed.

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C. F. Kingsley, for the appellant.

W. B. Ruggles, for the respondent.

By the Court, JOHNSON, J. The exception to the judge's charge was a mere general exception, and there is nothing to show as to which part or proposition in the charge it was intended to apply. Such an exception is of no avail where there is more than one point in a charge, and any portion of it is unexceptionable. But I think the charge was, in all respects, right. If the contract was that the plaintiff was to abide and be governed by the railroad inspector of wood, in respect to the quantity, then clearly he was entitled to have the wood actually measured by such inspector, or to have something done which would be equivalent to a measurement. He would not be bound by the mere guess or loose estimate of such inspector, as to quantity.

In respect to the other point in the case—that the court erroneously allowed evidence to be given to show that both the defendant and his son, who was his witness, stated the bargain for the purchase of the wood differently, on the trial before the justice, from what they had stated it in their testimony on the trial then pending in the county court—the exception to the ruling is not well taken. The difference in the two statements was quite material upon the merits of the controversy; to wit, the quantity of wood which went into the purchase, to be paid for by the defendant. As to the defendant himself, it was principal evidence against him, upon the issue. It was in the nature of admissions or declarations by a party, which are always competent as principal evidence against the party making them. It was also competent as impeaching evidence against him, or his witness. It is a different statement of a material fact. They denied having stated the bargain differently on the former trial, but alleged that

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on that occasion they had stated the bargain as they did on the then present trial. Had they admitted that they stated it differently on the former trial, and that the omission there arose from a want of recollection of the fact, at the time, it would have presented a different question. In that case there would be no propriety in proving the former statement by the other testimony.

All that was decided in the case of *Commonwealth v. Hawkins*, (3 Gray, 463,) relied upon by the defendant's counsel, was that the mere omission, in a former statement, to state a particular fact now stated, was not the proper subject of comment by counsel to the jury, against the credibility of a witness, unless the attention of such witness had been called to the omission, in the course of his examination.

There was no error committed in the county court, and the order must be affirmed.

[MONROE GENERAL TERM, September 6, 1869. *E. Darwin Smith, Dwight and Johnson*, Justices.]

VAN VALKENBURGH and WARD vs. THAYER.

The plaintiffs' sheep broke out of the lot where they were grazing, and mingled with the sheep of the defendant, which were being driven along the highway, without any fault on the defendant's part. All he did was to allow them to go along the highway with his flock to his own premises where they could be conveniently yarded and separated. On arriving at the defendant's premises the plaintiffs' sheep were separated, and turned into the highway and driven towards the place where they mingled with the defendant's flock. *Held* that upon these facts there was nothing to justify the conclusion that the defendant either unlawfully took the sheep in question, or converted them to his own use.

APPEAL by the defendant from a judgment entered upon the report of a referee.

The action was brought to recover the value of twenty-

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seven sheep, alleged to have been wrongfully taken by the defendant and converted to his own use. The referee found the following facts:

That on the 5th day of August, 1868, the plaintiffs were the owners of twenty-seven fat sheep, which were depasturing on lands of the plaintiff Van Valkenburgh, situate in the town of Le Roy, and inclosed with an ordinary fence. That on the day last aforesaid, the defendant was driving his own sheep, 150 in number, in and along the highway adjoining Van Valkenburgh's lot, when the plaintiffs' sheep escaped over the fence into the highway and intermixed with the defendant's sheep, without any fault of the defendant. That the defendant made no effort to separate the sheep, but drove them, so intermixed, two miles to his own farm, where he yarded and separated them and turned the plaintiffs' sheep into the highway and drove them back to within one hundred and thirty rods of the place where they had intermixed, and left them in the highway. That on the day following the plaintiffs made search for their sheep unsuccessfully, and the same were lost to them. The value of said sheep was \$79.50.

Upon the foregoing facts the referee found, as a conclusion of law, that the defendant was liable to the plaintiffs for the value of said sheep, and he ordered judgment in favor of said plaintiffs, and against the defendant, for \$79.50.

D. J. Bissell, for the appellant.

I. This is an action of *trepass de bonis*, based solely upon a wrongful taking. And no proof of a demand and refusal, or of a subsequent conversion, is competent in the case, or will warrant a recovery. (1 *Cowen's Tr.* 305. 8 *Wend.* 474. 1 *Bos. & Pul.* 404. 5 *Man. & Grang.* 760. 18 *John.* 283, *Spencer, J.* 2 *Selwyn*, 841. 1 *Bing.* 213. 21 *Barb.* 589.)

II. The case cannot be sustained upon the ground of the defendant's negligence. 1. It will not be pretended,

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in treating of this action, that the defendant has been guilty of a *misfeasance*, or the perpetration of any positive forcible act by which the property was injured or destroyed. It can only be claimed as a case of *nonfeasance*, that is, the failure to perform some act or duty which he owes in the premises. Now, it is well settled that "in order to entitle the plaintiff to maintain this action in the instance of nonfeasance, there must be some trust to which the law annexes a duty to take care of the goods. For when a man is the mere finder of goods, he is under no legal obligation to keep them safely, or exercise any degree of care about them. (1 *Cowen's Tr.* 349, 350. *Cro. Eliz.* 219.) "As, if he find garments, and by negligent keeping they are moth-eaten, or find goods and loses them again, or a horse and gives him no sustenance, or find butter and lets it putrify by negligent keeping," &c.

III. Negligence in any degree, is but an omission of duty, and where there is no legal duty there can be no such thing as negligence. (*Tonawanda Railroad Co. v. Munger*, 5 *Denio*, 255. 4 *N. Y. Rep.* 349; *S. C. affirmed.*) Cattle escaping from the owner's inclosure into the highway against his will, are not lawfully going at large within the meaning of the statute, and this, notwithstanding a town regulation authorizing it. (*Beardsley, J.*, 5 *Denio*, 263.) 1. An action for negligence cannot be sustained if the act of the plaintiff, negligent or willful, coöperated with the misconduct of the defendant to produce the damages sustained. (*Id.* 265, and cases cited.) 2. These sheep had no right in the highway; their being there must be deemed through the negligence of the plaintiff, and this contributed to their subsequent loss. The court say (*Id.* 267) "the plaintiff was bound, at his peril, to keep his cattle at home," &c. (*Vide also Story on Bail.* §§ 19, 22; 3 *Denio*, 236; 1 *Cowen*, 78, *Strays*; *Brownell v. Flagler*, 5 *Hill*, 282.) "One who complains of the negligence of another must himself be without fault." (*Cook v. Champlain Tr.*

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Co., 1 Denio, 99.) *Bush v. Brainard*, (1 Cowen, 78,) and *Blythe v. Topham*, (Cro. Jac. 158, 9,) were both cases where animals strayed; in the one case upon the uninclosed woodland of the defendant; in the other upon the commons, and in each case were injured by the wrongful act or negligence of the defendant; and the courts say, "the plaintiff showing no right why his property should be there, his loss is *damnum absque injuria*." (19 Wend. 401, and cases cited.) 3. The question is not which party is most to blame, but has one party suffered damages from the fault of the other, without having contributed thereto by his own fault, or want of ordinary care and prudence. (*Clark v. Kirwan*, 4 E. D. Smith, 21. Vide also *Bowman v. T. and B. Railroad*, 37 Barb. 516; *Hartfield v. Roper*, 21 Wend. 622, Cowen, J.) "If cattle are in the street without any one to attend them, it is a degree of carelessness in the owner which would preclude his recovery of damages arising from mere inattention of a traveler." 4. So if a child be in the highway unattended, of such tender years as to be unable to take care of itself, and be there run over without the willful negligence of the defendant, no recovery can be had. (*Id.* 619.) 5. It is a well settled principle of the law of bailments that no person can be made a depositary without his knowledge and consent, nor can he have the duties and responsibilities appertaining thereto forced upon him against his will. (*Waite's Dig.* 309, "Depositum." *Lethbridge v. Phillips*, 2 Starkey, 544. *Edson v. Weston*, 7 Cowen, 278.) 6. The owner of property must take care and intrust his property to the care of safe depositaries, and if goods are lost by the gross carelessness of such depositaries, the owner must sustain the loss. (*Waite's Dig.* 311.) 7. Notice should have been given to the tenant when these sheep were placed in the pasture by the plaintiffs, and their failure in this respect was negligence.

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T. P. Heddon, for the respondents.

I. The defendant saw the sheep escape and intermingle with his own flock. He was fully aware of the escape of the sheep, and where they escaped from. If separation at the place was not practicable, the defendant having driven the sheep away, was bound to return them to the place from whence they were driven, after separation was had. Failing to do this, he is answerable for the value of the property as for conversion. "One lawfully in possession of property, who wrongfully parts with possession, to the injury of the owner, is liable in trover for conversion." (*Spencer v. Blackman*, 9 Wend. 167. *Murray v. Burling*,¹⁰ John. 172-175.) "A slight interference of the defendant with the property makes him liable in trover." (*Farrar v. Ohauffetete*, 5 Denio, 527-532.) The least the defendant could do was to return the property to the place where it came to his control. (*Carruthers v. Hollis*, 8 Adol. & Ellis, 113.) In *Cutter v. Fanning*, (2 Clark's Iowa Rep. 580,) the precise question involved in the case at bar was decided in favor of a recovery. At page 591 the court say: "If the plaintiff's sheep mixed with the defendant's drove, *by the plaintiff's neglect*, and the defendant did use due diligence in separating them, and could not succeed, he would not be liable without a demand and refusal. If, however, he subsequently negatived the plaintiff's right to the property, or did any act which was inconsistent with such right, the conversion would be complete." Also, on same page, the court further say: "An offer to return the sheep at Davenport, or at any distance from the plaintiff's residence, or from where the sheep were taken, would not bar the action." (See also *Brownell v. Flagler*, 5 Hill, 282.)

II. The defendant, by driving the sheep a distance of two miles without any attempt to separate them, was guilty of conversion. But if not, and they were separated at the earliest and nearest available time and place, then he is answerable for conversion in this, that when he as-

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sumed to undertake the return of the sheep he was legally bound to see that it was done. Leaving the sheep a half mile from where they were taken, charges him with a conversion when loss follows. "To maintain an action for the wrongful conversion of property, it is enough that the rightful owner has been deprived of it by the unauthorized act of another assuming dominion over it." (*Boyce v. Brockway*, 31 *N. Y. Rep.* 490. *Cobb v. Dows*, 9 *Barb.* 231-242.) The sheep were left in the angle of the road east of Tillou's house, when last seen by the defendant's agents, and were going from the lot where they escaped. Thayer's direction was to drive them up as far as they would go; if they went toward the farm, all right; if they went the other way, all right. There was no direction or effort to return the sheep to the place from whence they escaped. The assumption of control over the sheep after the defendant had separated them from his flock, by driving them along the highway and leaving them 130 rods from where they were taken, charges him with the responsibility of their loss. Nothing short of returning them to the possession of the plaintiffs could relieve him. (*Cutter v. Fanning*, 2 *Clark's Iowa Rep.* 580-591.)

III. The pretense of the defendant that the loss of these sheep occurred through the plaintiffs' negligence, is entirely without foundation. The referee refused so to find, and there was no testimony to justify the finding of negligence on the part of the plaintiffs. The plaintiffs put the sheep in question on their own premises. These premises were properly inclosed. The plaintiffs were under no obligations to inform any one they had placed the sheep there. "In the exercise of his lawful right, every man has the right to act on the belief that every other person will perform his duty and obey the law." (*Jetter v. N. Y. and Harlem Railroad Co.*, 2 *Keyes*, 154.) These sheep escaping from the plaintiffs' premises with the knowledge of the defendant, his duty was to separate

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them there or return them to the lot when separated. The plaintiffs used due diligence in searching for the sheep, as soon as they ascertained their loss. The pretense of negligence on the part of the plaintiffs is absurd. No sensible standpoint for the defendant's claim of negligence can be seen short of this, that the plaintiff had no business to own the sheep; if they had not owned them they would not have lost them. There is no possible relation between any act of the plaintiffs and that of the defendant in driving the sheep away, upon which negligence can be inferred. The plaintiffs' acts do not stand in proximate or remote relation to anything done by the defendant. (*Savage v. The Corn Fire Ins. Co.*, 3 *Trans. Rep.* 112-115. *Haley v. Earle*, 30 *N. Y. Rep.* 208-210.) The negligence of the plaintiffs, if any existed, must have been such as to have been the assisting or prevailing cause of injury.

By the Court, JOHNSON, J. The action was for the unlawful taking, by the defendant, of the plaintiffs' sheep, and converting the same to his own use. Upon the undisputed facts of this case, and upon the facts found by the referee, there is nothing to justify the conclusion that the defendant either unlawfully took the sheep in question, or converted them to his own use. The testimony all shows, without any contradiction, and so the referee finds, that the plaintiffs' sheep broke out of the lot and mingled with the sheep of the defendant, which were being driven along the highway, without any fault on the defendant's part. All he did was to allow them to go along the highway with his flock to his own premises, where they could be conveniently yarded and separated. This was done immediately, by the defendant, on arriving at his premises. The plaintiffs' sheep were separated and turned into the highway, and driven in the direction of the place from which they had escaped when they mingled with the defendant's flock. Clearly here

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was no unlawful taking. The possession which the defendant was compelled to have for the time being, of the property, against his will, was, under the circumstances, justifiable and lawful. The possession, while it continued, being lawful, was there a conversion afterwards? Clearly there has been no illegal detention, or intermeddling with, or exercise of dominion over, the property, by the defendant in any way subversive of the rights of the owners. All the defendant's acts were with a view to get rid of the property and free himself from it, not to convert it to his own use. It is not found, nor can it be pretended, from the evidence, that the sheep could have been conveniently separated in the highway. It was no unlawful exercise of right, or dominion, on the part of the defendant, to take them to his yard merely for the purpose of getting them out of his flock. He did not even know or suspect, as the testimony clearly shows, that the sheep belonged to the plaintiffs. On the contrary, he had been informed by the person in charge of the farm, that they were stray sheep, which he supposed had come "from the other road," upon the farm. There was no reason, therefore, to induce, or require, the defendant to return the animals to the exact point at which they had intruded themselves into his flock. He had just seen the plaintiffs' agent at the farm, trying to drive the sheep from the premises. He did in fact drive them to within one hundred and thirty rods of the point where they mingled with his flock, and, as I understand the evidence, to the "other road," through which the sheep were supposed to have come, and there left them, in order that they might find their way home.

It is quite apparent that the defendant acted in entire good faith in doing what he did, and neither wished nor attempted to do anything to interfere with the rights of the owner of the property, whoever he might be.

The subsequent demands made by the plaintiffs were

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of no avail, as they were made at a time when it was known the sheep were out of the defendant's possession. The defendant never became the plaintiffs' bailee of the property. His possession, such as it was, was forced upon him, and only continued until a separation from his own flock could be conveniently and properly effected.

The judgment must therefore be reversed, and a new trial ordered, with costs to abide the event.

[FOURTH JUDICIAL DEPARTMENT, GENERAL TERM, at Buffalo, June 6, 1870.
Mullin, P. J., and *Johnson* and *Talcott*, Justices.]

THE PEOPLE vs. THE ALBANY AND SUSQUEHANNA RAILROAD
COMPANY and others.(1.)

Upon a trial by the court the successful party is under no obligation to submit a draft of the judgment to the adverse party, for amendments. The court may, in its discretion, require it, and direct that the judgment be settled before itself or one of its members.

In case the decision of the court fails to find upon all the facts deemed by the unsuccessful party to be material, his remedy is to propose a finding thereon in his proposed case and exceptions; and it is the duty of the judge, on the settlement thereof, to pass upon the same and to find as requested, or to refuse to so find, so that the party may have the benefit of an exception to his refusal. (*See note b.*)

It seems an appeal lies to the general term from an order of the special term, in the nature of an interlocutory decree directing a receiver in the action to surrender the property in his possession to another receiver or to a party to the action.

An order staying all proceedings on the "decision" of the court, if not served until after the entry of judgment, becomes *functus officio*, and does not operate as a stay of proceedings after judgment.

An order staying all proceedings under a judgment does not, it seems, stay an independent proceeding against a receiver in the action, to compel him to surrender property he is ordered thereby to deliver to the successful party.

(1.) For this case, and the learned notes accompanying it, the Reporter is indebted to N. C. MOAK, Esq., of Albany.

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If otherwise, an order directing such surrender can only be attacked on a direct proceeding to set it aside.

Proceedings to compel the delivery of property, upon a judgment for costs and the delivery of property, are not stayed by an undertaking conditioned to pay such costs and the costs of the appeal.

If a party has been exercising his legal right, the court cannot inquire into his motives for so doing.

It is proper and quite usual for the court, especially in cases where the findings are long, to furnish the attorney of the successful party with a brief minute of its decision, and request him to prepare proposed findings of fact and conclusions of law. When corrected and signed, the court usually delivers the decision to the successful party to be filed.

Matters set forth in motion papers, or filed, which are not material to the decision, are impertinent, and if reproachful, are scandalous, and may be suppressed by the court on inspection.

A PPEAL from an order made at a special term. The facts sufficiently appear in the opinion.

David Dudley Field, for the Church-Fisk directors.

G. F. Danforth, for the Ramsey directors.

By the Court, TALCOTT, J. This is an appeal from an order made at a special term held in Monroe county, denying a motion made by Messrs. Field and Shearman, as attorneys for "Church and others," to set aside all proceedings taken upon the "alleged judgment," entered 31st December, 1869, to require the receiver, Robert L. Banks, to retake possession of the property of which he was originally made receiver, and the persons to whom he has surrendered it to restore possession to him or some other receiver, and to vacate and set aside the alleged judgment and the decision therein mentioned, as irregular, or, in the alternative that so much of the motion be denied, then that the said "alleged judgment" be set aside, and the said decision and findings be sent back to the judge who tried the cause, for re-examination and re-

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settlement, and for other and further relief, &c. The opinion below is reported 8 *Abb. N. S.* 122.

It is not entirely certain, from the papers before us, in behalf of what parties the motion was made, as the notice of motion was given by Messrs. Field and Shearman, as attorneys for the defendants Church and others, and nothing appears in the papers to show for what other defendants, besides Church, Messrs. Field and Shearman had appeared as attorneys.

The appeal, however, was argued upon the assumption on both sides that the motion was made in behalf of the persons claiming to be directors of the railroad company, who had assumed to elect Walter S. Church, Esq., as president, and who on the argument were, and herein for convenience will be, styled the Church directors, and was resisted by those claiming to be directors of the company, who had assumed to elect Joseph H. Ramsey, Esq., as president, and who were, and will be herein, styled the Ramsey directors. Both sets of directors, with the presidents by them respectively elected, were parties defendants to the suit. The appeal before us, as appears from the notice of appeal, was taken by the Church directors and one A. J. Phelps. The complaint in the action is not among the papers submitted to us, and from the papers before us we are unable to discover the connection of Mr. Phelps with the case. But it was not claimed upon the argument that he had any interest or right, other than such as was asserted in behalf of the Church directors.

These rival sets of directors had been contending for the possession of the franchise and property of the road, and not only were a great variety of suits commenced, and injunctions issued, in the interest of these respective parties, but the public peace was seriously endangered and even disturbed by their controversies. Under these circumstances the governor of the State, at the request of

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both parties to the controversy, and in the interests of public order, took, by his agents, temporary possession of the road and its property, and therefore the attorney-general, upon the request of the governor, instituted this action, the main object of which was to determine whether either, and if either, then which of the rival sets of directors had been lawfully chosen, and was entitled to the possession of the franchises and property of the company.

The action was tried before Justice E. DARWIN SMITH, at the Monroe special term, held on the 29th day of November, 1869. The said justice delivered an elaborate opinion in the case, which it appears was published in the Rochester morning papers of December 31st, 1869, and on that day the findings of fact and conclusions of law arrived at by the said justice, and stated by him in writing, were duly filed, and the judgment or order complained of was entered on the same day, at 2 o'clock and 30 minutes, P. M. By this judgment or order the Ramsey directors were declared to have been duly elected, and to be the lawful directors of the company. It was ordered that certain of the defendants recover their costs of the action against the Church directors; that it be referred to Hon. Samuel L. Selden to pass the accounts of the receiver, and to report what would be a proper extra allowance in the action, and to which of the defendants it should be paid; "to settle such other matters of detail as may be necessary to carry this judgment into effect;" and that the Ramsey directors be let into immediate possession of the property and effects of the road company; and that Mr. Banks, the receiver, transfer to them all the property and assets of the railroad company in his hands, retaining out of the moneys in his hands as such receiver, his fees, expenses and charges to be adjudged by the referee.

The special term which made the order now appealed from, as a part of the order, directed the suppression of

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certain affidavits on both sides, and a certain certificate used on the motion.

The points insisted upon by the counsel for the appellants will, for convenience, be considered *seriatim* in the order in which they are presented by their brief.

1st. It is claimed that it was the duty of the successful party, after making a draft of their judgment, to submit it to the adverse party to propose amendments, and that the omission to do so renders the judgment irregular. We do not understand that the service of a draft of judgment and the other proceedings referred to is required by any present provision of law or rule of court, or has been usual under the present practice. Under the former practice of the Court of Chancery, it was customary, in cases where the decree was very special in its character, to serve a copy of the proposed decree upon the opposite party, with notice of settlement before the register. This practice apparently grew out of the fact that there was no other guide to the form of the decree than the mere minute of the decision, or the opinion delivered by the court.

In case the register did not understand the decision, he was in that case only to apply to the court for information.

But it does not appear that it was the practice of that court to set aside a decree merely upon the allegation that a draft had not been previously served and a settlement made on notice.

There was no specific finding of all the facts or conclusions of law accessible to the register or the parties. As the Code now provides that the justice who tries the cause shall give a decision in writing, which shall contain a statement of the facts found and the conclusions of law separately, and that "judgment upon the decision shall be entered accordingly, the reason for the former practice is in a great measure done away with, though something similar may be, and often is, convenient under our present

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system. (a) It is not unusual, at present, when the judgment requires provisions of a special character, for the court in its discretion to order it to be settled before, not the clerk, but itself or one of its members. This is often done in the Supreme Court, and sometimes in the Court of Appeals. An instance of the latter occurs in the case of *Schermerhorn v. Tallman*, (14 N. Y. Rep. 94,) where it was ordered that the judgment be settled before Judge Selden. Owing to the certainty which the clerk and the attorneys may now arrive at in regard to the decision of the court, touching all questions of fact and law intended to be decided by it, the former practice has been long since abandoned, and the settlement of the form of a judgment upon notice, now takes place only by the express direction of the court, or by the special agreement of the parties. And it is necessary, before a party can set aside or even modify a judgment for want of notice of settle-

(a) Before the amendment of section 267 of the Code, in 1870, it was settled that it was the duty of the *clerk*, unless otherwise directed by the court, to enter judgment at once on the filing of the decision or report, and that the successful party might cause it to be done, (*Cotes v. Smith*, 29 How. Pr. 326, *affirmed* 31 *id.* 158;) also that the omission of the clerk to do so would not be allowed to prejudice the party. (*Butler v. Lee*, 33 How. Pr. 252.)

That amendment provides that in cases of trial *by the court*, "judgment upon the decision accordingly, *shall* be entered *four days* thereafter." Is not this an unwise provision? Suppose a controversy between rival presidents or directors of a railroad company, as to who is such, *de jure*, and entitled to the control of its funds, often amounting to millions, to be determined against the officers *de facto*, who have possession and control of the funds. Might not a single unsuccessful defendant step over to New Jersey with them? Every lawyer will readily perceive a multitude of cases where a delay of justice after its certainty is known, will be equivalent to its denial. As the amendment provides that judgment *shall* be entered four days thereafter, would the court, even in a proper case, have *power* to deprive the successful party of a *statutory* right, and stay proceedings for more than four days? Would it not be far better for the legislature to concede to the courts honesty equal to that possessed by its members, and to assume that courts will properly exercise a discretion confided to them, and allow them to control their determinations?

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ment, to show that in some material particular, to be pointed out, it is entered otherwise than in accordance with the findings of fact or law, as stated by the judge or referee.

2d. It is said this judgment should be set aside for what is called a "mistrial," by reason of the omission of Justice SMITH to decide the issues which were in the case and contested on the trial.

On this point it might be sufficient to say that the appeal papers do not disclose to us the evidence in the cause, so that we are unable to see what was contested on the trial. But assuming the position of the counsel for the appellants to be well founded in fact, we are of the opinion that whatever may be the remedies to which a party may resort, in case of the omission to find a fact supported by the evidence, and deemed material, a special motion to set aside the judgment for irregularity is not among them, according to a recent decision of the Court of Appeals; the remedy, in case the fact is established by uncontroverted evidence, is by appeal. (*Mason v. Lord*, 40 N. Y. Rep. 476.) Where the evidence is conflicting as to the fact, the omission to find which is complained of, the remedy is, at the time the case is presented to the judge for settlement, to present and leave a request to find such facts and conclusions of law as he deems necessary to be found in order to protect the rights of the party; and it is the duty of the judge to pass upon such requests, and to find as requested or then refuse to find, so that the party may have the benefit of an exception to his refusal.

Such we understand to be the construction of section 268 of the Code, which requires the judge, *on the settlement of the case*, to specify the facts found by him, and his conclusions of law. (b)

(b) It is strange that the theory of making and settling a case and exceptions upon trials before the court or a referee does not seem to be understood by many of the profession.

Section 272 of the Code, which applies to referees, provides that "their

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The omission to find the alleged fact may have resulted from inadvertence on the part of the justice who tried the cause; on the other hand, it may have resulted from his having determined the fact against the party complaining of the omission, or he may have determined the fact to be immaterial in the case.

In either of the two latter alternatives, a motion at decision must be given, and may be *excepted to* and reviewed in *like manner*, and with like effect, *in all respects* as in cases of appeal under section 268, (trials before the court,) and they may *in like manner* settle a case or exceptions," (*See Otis v. Spencer*, 16 N. Y. Rep. 611;) so that the manner of excepting and proposing a case and exceptions, and settling the same, is identical in cases of trial before the court or a referee, and a brief history of preparing for a review of the determination before a referee will equally apply to one where the trial has taken place before the court.

The theory of the *statute* (the Code) is that the decision or report shall be *general* for such judgment in favor of the successful party, as he is found to be entitled. "The decision of the judge or report of the referee, which goes into the record, is merely the authority for entering the judgment, and therefore it merely states, in general terms, what the judgment is to be. All beyond that is mere supererogation." (*Otis v. Spencer*, 16 N. Y. Rep. 612.) It is true, section 272 provides that "*referees* shall state the facts found, and the conclusions of law, separately." This provision is given at length in the case last cited, and we understand that case to hold that it applies to the settlement of the case and exceptions, and that the decision of the judge, and report of the referee, as contemplated by the Code, may be general, although the court, in *Manly v. Insurance Co.*, (1 Lansing, 23,) seems to think this section requires the referee to find the facts and conclusions of law in the first instance. In cases where a party may be defeated upon either of several grounds, the report would not inform him what theory the referee adopted upon that, or whether the referee found with him or against him upon others. To remedy this, in part, the court, by its rules, (*Rule 32*,) provided that, upon a trial by *referees*, "they shall, in their decisions and final reports, state the facts found by them, and their conclusions of law, separately." This provision of the rule is supplementary and *additional* to the *statutory* requirements, as to the manner of proposing and settling a case and exceptions for review, which provide that a case and exceptions may be proposed and settled by a referee in "like manner" as by a judge, (§ 272,) and that the judge, "*in settling the case, must* briefly specify the facts found by him, and his conclusions of law."

Until the amendment of section 268, in 1869, although the appellant might have been entirely satisfied with the facts as found by the decision or report, and might not have wished any additional ones, and notwithstanding the

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special term would be simply a review of the decision of the special term which decided the cause, and a review of a judgment at special term cannot be had at another special term.

3d. It is claimed that no judgment has yet been perfected, so as to be the subject of review on appeal. That until it becomes complete and final it is not in a condition

decision or report may have been a part of the record, (the judgment roll,) he was, by the decision of the Court of Appeals in *Hunt v. Bloomer*, (13 N. Y. Rep. 841,) and *Johnson v. Whitlock*, (*Id.* 844,) that the court would not look outside the case for the facts, required to again incorporate and print the substance of the decision or report in the case. The amendment of 1869 (§ 268) relieved him of this burden by providing that, "for the purposes of an appeal from a judgment rendered on the report of a referee or the decision of a judge on a trial without a jury, it shall not be *necessary* to insert at large, in the case, the findings of fact or conclusions of law of such judge or referee, or the exceptions thereto filed, but if the same appear as part of the judgment roll, they may be referred to and used on the argument of the appeal, with the same effect as though inserted in the case." It is not now "*necessary*" to repeat the facts so found, although the appellant may, at his option, do so, and it is, perhaps, advisable he should, when he wishes additional facts found, in order to have all the facts appear in connection. Suppose a case to have been decided by a referee, and his report to contain all the facts the appellant desires, and he wishes to claim, upon appeal, that the conclusion of law drawn from them is not correct; he can, within ten days, file and serve exceptions to such of the legal conclusions, or portions of them, as he is dissatisfied with, being careful not to have any particular exception cover too much. Thus suppose the conclusion of law to be, that the "plaintiff is entitled to judgment for \$50 and interest from May 1, 1860, and costs." If the defendant wish to claim that there was not as much as \$50 due the plaintiff, he excepts, 1. To so much of the referee's report as holds that the plaintiff is entitled to recover \$50 damages. 2. If he claim that the plaintiff was entitled to *no* interest, to so much thereof as holds that the plaintiff is entitled to recover interest upon \$50, from May 1, 1860, or any other time. 3. If he claim that interest was allowed for too long a time, to so much thereof as holds that the plaintiff is entitled to recover interest for a greater period than from the 1st day of May, 1868. 4. If he claim that the plaintiff should have recovered interest upon only a part of the amount found, to so much thereof as holds the plaintiff is entitled to recover interest upon more than \$30 of the amount awarded. 5. To so much thereof as holds the plaintiff is entitled to recover costs. He can thus review each question separately, while, if he except generally to the entire conclusion of law, the court might hold he could not so review either question,

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to be executed, and that all proceedings taken under it ought to be set aside.

Conceding that this were, as claimed by the counsel for the appellants, not a final judgment, but in the nature of a decretal order, or interlocutory decree, the proceedings under it which they ask to set aside are simply the surrender of the property by the receiver, and the taking of the possession by the Ramsey directors.

and that if the plaintiff were entitled to recover \$50 damages, the question of interest could not be reviewed. If he except generally to the allowance of any interest; if the plaintiff were entitled to *any* he could not insist that the time when it was commenced was erroneous. (*McMahon v. N. Y. and Erie Railroad Co.*, 20 *N. Y. Rep.* 463. *Graham v. Chrystal*, 1 *Abb. N. S.* 121. *Matthews v. Duryee*, 4 *Keyes*, 525.)

Every presumption will be made by the appellate court in favor of affirmance, and the appellant must, in the Court of Appeals, present *facts*, found affirmatively, which, on their face show error. If they are not found at all, the court will presume they were found for the respondent, (*Grant v. Morse*, 22 *N. Y. Rep.* 323; *Manly v. Ins. Co.*, 1 *Lansing*, 20; *Farmers' &c. Bank v. Parker*, 37 *N. Y. Rep.* 150; *Bissell v. Pearce*, 28 *id.* 255; *Simon v. Schurek*, 29 *id.* 615;) provided upon examining the evidence it appear that it would warrant such additional findings. (*Valentine v. Conner*, 40 *N. Y. Rep.* 248.)

In order to found an objection to a refusal to find any fact, even though there be no evidence to the contrary, the referee must be requested, by the proposed case and exceptions, specifically to find the fact, and if he refuse, an exception must be taken to such refusal. (*Grant v. Morse*, 22 *N. Y. Rep.* 323. *City Building Company v. Fatty*, 4 *Transcript App.* 312.) If the evidence upon the question be not conflicting, the exception to such refusal, or if it be found, to its finding, then presents a question of law. (*Mason v. Lord*, 40 *N. Y. Rep.* 476. *Wyman v. Childs*, 41 *id.* 159. *Porter v. Ruckman*, 38 *id.* 210. *Draper v. Stouvenel*, *Id.* 219.)

Suppose a case where the party defeated desires to review the referee's decision, and his report does not find, or refuses to find, one way or the other upon *all* the facts the appellant desires to present, so that exceptions to that will not be sufficient; or that he wishes to contend that a fact found was entirely unauthorized by evidence; or wishes to insist, as he may do at the *general term*, (*Waters v. Green*, 3 *Keyes*, 885; *McCabe v. Brayton*, 38 *N. Y. Rep.* 196; *Loeschick v. Baldwin*, *Id.* 326,) that the finding was contrary to evidence. He must then prepare and serve a case containing the evidence. He should file and serve separate exceptions to the facts and conclusions appearing in the report, within ten days, or such extended time as he may procure, unless he serve his case and exceptions, containing also such exceptions to the facts

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We see no reason to doubt that the court may, by order in the nature of an interlocutory decree, direct its receiver in the action to surrender the property in his possession as such receiver, to some of the parties to the action, to another receiver, or even, as has sometimes been done, to a third party claiming it. And whether such order be interlocutory or final, an appeal lies to the general term, at least.

and conclusions appearing in the report as are necessary to present the questions deemed material. If the case and exceptions contain exceptions to the facts and legal conclusions in the report, or such facts be repeated therein, followed by exceptions thereto, it is not *necessary* to serve them separately. The case "will be, of itself, a compliance with the first clause of the section, and no other exceptions will be required to satisfy that clause." (*Hunt v. Bloomer*, 13 N. Y. Rep. 848. *Johnson v. Whitlock*, *Id.* 847.) It is advisable, if a case be made, to insert them therein. The referee is bound to allow such exceptions as the appellant desires to insert, and if he refuse to do so, the court will send the case back to him for resettlement, and compel him to resettle it. So if he refuse to find one way or the other upon any question of fact proposed in the case, the court, on motion, will compel him to so find, without directing whether the finding shall be in the affirmative or the negative, as the appellant has a *right* to have his *original* case so settled that he can go to the Court of Appeals with it. (*Johnson v. Whitlock*, 13 N. Y. Rep. 349, 350. *Priest v. Price*, 3 Keyes, 222. *Manly v. Insurance Co.*, 1 Lansing, 24-26. *Casler v. Shipman*, 35 N. Y. Rep. 538, 542. *McKeon v. Sea*, 4 Rob. 449, 464.) He should *insist* upon a finding one way or the other, as a *matter of right*, as an exception will not lie to a mere refusal to find at all, (*Casler v. Shipman*, 35 N. Y. Rep. 538; *Colwell v. Lawrence*, 38 *id.* 71; *Preston v. Price*, 3 Keyes, 222;) unless, possibly, in a case where there was no conflict in the evidence. (*Mason v. Lord*, 40 N. Y. Rep. 476. *Marvin v. Inglis*, 39 How. Pr. 329.) On appeal from the judgment, an order refusing to compel a finding on any material question may be reviewed. (*Casler v. Shipman*, 35 N. Y. Rep. 542.) The practice has, (unless in the seventh district, as hereafter shown, prior to the adoption of the present system of departments,) so far as we are aware, been uniform. In the third district, in *Phelan v. A. and S. Railroad*, (*reported on the merits*, 1 Lans. 258,) the case was twice sent back to the referee, on his refusal to find either way upon certain facts proposed by the case; the court the last time (Albany special term, March, 1869) making an order as follows: "Ordered that the case and exceptions herein be sent back to the referee for further settlement of the following facts proposed by the said case and exceptions, (specifying them separately.) It is further ordered, that said referee find one way or the other upon each of said proposed findings, and upon each portion thereof,

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4th. It is next claimed that the proceedings taken under the judgment or order should be set aside, because they were taken in despite of the two orders to stay proceedings, made by Mr. Justice Barnard, and of the appeal and undertaking.

The first order of Justice Barnard was to stay all proceedings on the "decision" of Justice Smith, until the findings of fact and conclusions of law had been served

whether the facts are, or are not, as proposed; and if he find that the same are not, or any portion thereof is not, as proposed, that he allow the defendant to interpose in the case and exceptions, such exceptions to his finding or findings as he may be advised." The cases were sent back for resettlement, and similar orders made, in *Hicks v. Dorn*, (reported on the merits, 54 Barb. 172,) at the same term, and in *Watson v. Shuttleworth*, (reported on the merits, 58 Barb. 357,) at a prior special term at Albany. Of course no fair minded referee would refuse to find one way or the other, upon any question as to which evidence was given on the trial, and he ought not to attempt to determine what questions are material, for the Court of Appeals may not agree with him as to what is material. If he err in such determination he deprives the party of all opportunity to procure the judgment of that court upon the question. Neither ought the court at special term, for the same reason, to do so, as a single fact, if found in favor of the appellant, may neutralize or destroy another, or turn the case.

The refusals to find, in the cases above referred to, were based upon the cases of *Lefler v. Field*, (33 How. Pr. Rep. 385;) *Nelson v. Ingersoll*, (27 id. 1;) *Sermont v. Bastjer*, (49 Barb. 362,) and possibly others in the seventh district, and not from any desire upon the part of the referees to avoid doing so. In those cases, however, the court held, contrary to the cases in the Court of Appeals above cited, that the court would make no presumptions in favor of affirmance, but if the facts found in and appearing upon the face of the report itself, did not justify the judgment, it would be reversed. The last two cases were upon review of the merits, on appeal, and not upon a motion directly to compel a referee to find upon facts proposed for settlement. The first arose on a motion to strike out of the printed case a statement that on the settlement of the case the referee was asked to find upon certain proposed facts, and that he refused to find either way, or to make any additional findings; so that the question whether the court, on motion, would have compelled him to find upon the proposed facts, did not arise in either case, as in the latter, the case, so long as the settlement was not changed, should have conformed to the settlement actually made. In *Trufant v. Merrill*, (37 How. Pr. 531; 6 Abb. N. S. 462,) the Superior Court of New York seems to have held that the court would not, before judgment, send the case back for further

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upon all the parties, with notice of settlement, and that judgment be not entered until the settlement of such findings and conclusions, upon due notice of settlement to all the parties.

This order appears to have been founded on the affidavit of Amasa A. Redfield, to the effect that he had learned that the justice had decided the cause adversely to the deponent; that deponent had received no formal

findings. This case was probably correctly determined; as, if the defeated party did not wish to appeal, a further finding would be useless and unnecessary; and if he did, he could procure the additional findings by proposing them in the case and compelling a finding. In the latter case the question did not, however, arise upon a motion to send the case back, but upon appeal from a subsequent order sending the case to a different referee to take and state the accounts. The Superior Court has expressly held that it was the *duty* of the court, in the *case and exceptions*, to find upon every material fact, and that as the party is not present at the decision, proposing a finding thereon in the case is the only way he can procure findings upon additional questions. (*McKeon v. See*, 4 Rob. 463, 464.)

The cases in the seventh district, and that in the Superior Court, seem to proceed upon the theory that as soon as the referee has made and filed his report he is *functus officio*, and cannot afterwards perform any act involving judicial discretion, *until set in motion by the court*. The settlement of a case and bill of exceptions is clearly a judicial act. (*Fielden v. Lahens*, 14 Abb. 48. *Birge v. The People*, 5 Park. Crim. Rep. 9.) It may well be that the referee cannot gratuitously volunteer new findings, and that in order to authorize him to make them, he should be set in motion by the court, but the court clearly does so constructively, (all acts done by the attorneys in a cause are constructively performed in court,) when a party authorized so to do by law and practice of the court calls upon him to settle a case and exceptions, as a necessary and proper step in the administration of justice by the court. The court constructively and legally calls upon him to exercise one of the duties which his appointment and his entering upon the office of referee require him to perform, and there is no more reason why he should not act judicially in finding facts, than in settling disputes between the parties as to the evidence given upon the trial, or any other question which arose thereon. We think we have shown that the above cases in the *seventh* district, from the manner in which the questions arose, did not pass upon the question we have discussed, and can be harmonized with the practice as we understand it. If, however, this be not so, the decision of the general term in the fourth department, including the seventh district, overrules them, and the practice in the Supreme Court is now uniform throughout the State.

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notice of the findings of fact or conclusions of law, as found by Justice Smith; and that according to his belief no such findings of fact had been filed or judgment entered. This seems to have been substantially the same application which had been previously made by Mr. Martindale to Justice Smith, on the same state of facts, and by him denied, which circumstance was not disclosed in the affidavit presented to Justice Barnard, and was perhaps unknown to the attorneys who made the application to the latter justice. (*See Rule 23d.*) However this may be, it is apparent on the face of Justice Barnard's order, that it was not intended to operate as a stay of proceedings after the judgment or order to be entered on Justice Smith's decision; and as it was not served till after the entry of that judgment or order, it became *functus officio* before service. A second order was made by Justice Barnard, staying all proceedings under the judgment until the entry of an order on the motion to set aside the judgment, not exceeding twenty days.

The act of the Ramsey directors in taking formal possession of the property occurred on the 31st of December; the order in question was not served upon any person till some time on the 1st of January. On that day proceed-

The case in the Superior Court does not, we think conflict therewith, and we doubt not that if the question were properly presented in that court, it would settle the practice, as it seems to have done in *McKeon v. See*, (4 Rob. 449,) in conformity to that of the Supreme Court, so that uniformity and certainty, so desirable in practice, will be secured.

The Court of Appeals has power to send a case back to the Supreme Court for resettlement, (*Westcott v. Thompson*, 16 N. Y. Rep. 613,) even after argument. (*Rice v. Isham*, 1 Keyes, 44, 47.) As the referee is not an officer of that court, but of the Supreme Court, a motion should be made in the latter court that the case be sent back to him for resettlement. (*Westcott v. Thompson*, 16 N. Y. Rep. 616.) And though the case be pending in the Court of Appeals, the Supreme Court, at special term, has power to order a resettlement, and that the corrected case be returned to the Court of Appeals, with a recall of the former, or a request to correct it. (*Whitbeck v. Waine*, 8 How. Pr. 433. *Luyster v. Sniffin*, 8 id. 250.)

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ings were taken before Justice Peckham, in Albany, on notice to the receiver, apparently with a view of obtaining the possession of the key of the safe. These proceedings before Justice Peckham were instituted by an order to show cause, founded upon affidavit, showing that the Ramsey directors had the day before taken possession of the office of the company, and by a formal resolution reciting the fact of the judgment, had assumed to take possession of all the property of the company. That Mr. Banks, the receiver, declined to deliver the key of the safe, and the order was to show cause why he (the receiver) should not deliver all the keys of the company in his possession. The proceedings before Justice Peckham, after hearing counsel for the receiver, resulted in an order made by that justice on the 1st of January, that the receiver should deliver over to Mr. Ramsey the keys of the safe, and all the other property of the railroad company in his hands, and, furthermore, declaring that the orders of Justice Barnard did not in any way affect the obligation and duty of the receiver to comply with the requirements of the judgment. The appeal papers do not show that anything was done in pursuance of the order of Justice Peckham. They do not show that the second order of Justice Barnard was served before those proceedings were instituted, although it appears that the order to stay had been served on the receiver before the final order made by Justice Peckham. There is nothing, therefore, to set aside, except the final order made by Justice Peckham.

It was held by Justice Mason, in a case quite analogous, that a proceeding such as that before Justice Peckham was not a proceeding upon the judgment. (*Welch v. Cook*, 7 How. Pr. 282.) There the application was for an order to deliver the books and papers belonging to the State treasurer. If that decision be correct, it is obvious that the order of Justice Barnard, made in this action, to stay proceedings on the judgment, could not have the effect

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to stay the proceedings before Justice Peckham ; and, at all events, we think the order of Justice Peckham could not be set aside except upon some direct proceedings to set it aside by motion, certiorari or otherwise.

No act is shown to have been done under that order, and we do not feel called upon simply to set the order aside on this somewhat collateral motion, the notice of which does not refer to the order.

As to the claim that the proceedings were stayed by the appeal and undertaking, the decision of Justice Mason, that the proceeding is not a proceeding on the judgment, equally applies, but moreover, as appears from the papers before us, the appeal was from the entry *as a judgment*, and the only undertaking filed is for the costs and damages to be awarded against the appellants on the appeal. The judgment appealed from directed the delivery of a large amount of real and personal property.

Section 348 of the Code provides that an appeal from a judgment entered on the direction of a single judge of the same court does not stay the proceedings, unless security be given as on an appeal to the Court of Appeals. Therefore to stay the proceedings on the appeal in this case, at least so far as regarded the delivery and taking possession of the property ordered to be delivered, it was requisite that security should be given, as provided in sections 336 and 338 of the Code. This was not done, or attempted.

5th. It is stated that the proceedings of the Ramsey party were taken for the purpose of forestalling an appeal and stay of proceedings.

We cannot inquire into the motives of the parties, but only whether they have been exercising their legal rights.

Under this point it is claimed that it is irregular for the judge to furnish the successful party with his findings before they are filed, or to permit the attorney for the successful party to draw up the proposed findings.

We think, on the contrary, this will be found to have

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been the usual practice. Sometimes the counsel for the respective parties submit, at the time of the summing up, the form of the findings and conclusions of law which they respectively claim should be arrived at in the case; and when this is not done formally and in writing, it is supposed that the arguments of the counsel have been addressed to the question of what conclusions of fact and law ought to be found and stated, upon the evidence.

And we think it has been quite usual in practice, especially in cases where the findings are long, for the justice who tried the cause to furnish the attorney of the successful party with a brief minute of his decision, and request him to prepare in form the statement of the findings of fact and conclusions of law; and when these have been submitted, and altered and amended according to the actual decision of the judge, the latter often, instead of going, or sending them, to the clerk's office, personally delivers them to the attorney to be filed. Sometimes the justice is in one place, the attorney for the successful party in another, and the clerk's office in a third, and in such cases it has not been unusual for the justice to send the findings, when signed, by mail to the attorney for the successful party, to be filed, and certainly in most cases, without any communication to the unsuccessful party.

In fact the decision of the judge as to drawing up, delivery and filing, has in practice been treated in the same manner as the report of a referee, and for the same reason. We are not aware that complaint has ever been made that a referee did not file his report personally; that it was drawn up by the successful party; or that it was not communicated before filing, to the opposite party; and we see no reason for a difference of practice in the two cases.

The sixth and last point made by the appellants relates to the suppression, on the motion below, of the certificate and affidavits. This was a motion to set aside the judgment or order for irregularity. The certificate was to the

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effect that the *opinion* of Justice Smith, delivered in the case, was erroneous. Obviously this had no bearing on the question of the regularity of the judgment. It is equally clear that the affidavits touching what transpired in the interview between Mr. Martindale and the justice, at the house of the latter, and again when the order to stay proceedings was moved for and denied, had no relevancy to the question.

Matters set forth in papers presented to the court, or filed, which are not material to the decision, are impertinent, and if reproachful, are scandalous. (1 *Barb. Ch. Prac.* 202.) This certificate and the affidavits in question being irrelevant, were impertinent, and the affidavits tending to impute to the justice vacillation of purpose or opinion, and to the counsel for the Church directors great infirmity of temper, were also scandalous. In such case affidavits and other papers, on a motion, may be suppressed by the court, on inspection. (1 *Barb. Ch. Prac.* 574.)

We are of the opinion that the order appealed from should be affirmed, with ten dollars costs, and order accordingly.

The order appealed from having been made by Justice JOHNSON, he did not sit on the hearing of the appeal.

Order affirmed.

[GENERAL TERM, FOURTH DEPARTMENT, at Buffalo, June 6, 1870. *Mullin and Talcott*, Justices.]

THE CORN EXCHANGE INSURANCE COMPANY vs. EDWARD BABCOCK and ARMINA his wife, and STEPHEN. E. BABCOCK.

An action at law, seeking an ordinary pecuniary judgment, as upon a personal contract, is not maintainable against a married woman who, without consideration and without benefit to her separate estate, and simply as the surety of her husband and for his accommodation, indorses his note.

In order to create a valid charge upon the separate estate of a married woman, there must be a specific description of the property, in the instrument creating it, executed according to legal formalities, and enforced in equity, under a complaint seeking as relief, not a general judgment, but the satisfaction of the charge out of the specific property subjected thereto.

Such a charge cannot be created by a married woman's accommodation indorsement of a promissory note, in these words: "For value received I hereby charge my individual property with the payment of this note;" where the attempted charge is not founded upon any benefit to her separate estate, or upon any matter in which she has an interest, or on account of which she has received any consideration.

Section 8 of the act of 1862, chapter 172, empowering a married woman, possessed of real estate as her separate property, to bargain, sell and convey the same, and to enter into any contract in reference thereto, refers to such modes and forms of bargain and sale and conveyance of real estate, and contracts relative thereto, as were recognized as legal, and were in conformity with the law existing at the time, and does not sanction a charge or contract of the kind above mentioned.

Section 7 of that act, authorizing a married woman to sue or be sued in all matters having relation to her sole and separate property, in the same manner as if she were sole, refers mainly to her right and liability to sue and be sued without having her husband joined with her, and was not intended to subvert the rules of law or legal proceeding then existing in regard to the essential characteristics of such actions, or the kind of relief to be sought, or the mode in which it is to be reached.

A PPEAL by the defendant Armina Babcock, from a judgment entered upon the report of a referee.

The action was brought upon three promissory notes, made by Stephen E. and Edward Babcock, and indorsed by the defendant Armina Babcock, in the following form:

"For value received, I hereby charge my individual property with the payment of this note.

ARMINA BABCOCK."

At the time the notes were made and indorsed, which was in 1863 and 1864, Armina Babcock was a married

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woman (being the wife of the defendant Edward Babcock) and the owner of a separate estate, consisting of real property. The other defendants, Stephen E. and Edward Babcock, were insolvent. The referee found that Mrs. Babcock made the indorsements for the benefit of the other defendants, and that she had no interest in the transaction; but there was no finding that she intended to charge her separate estate. The action was in the ordinary form of action against makers and indorsers, except that the above indorsement was literally copied, and the complaint alleged that Armina Babcock was in the possession of separate estate, and that she intended to charge such estate.

On the trial the appellant raised several objections to the plaintiff's recovery, and moved to dismiss the complaint, because it asked for a personal judgment against a married woman; on the grounds that she was improperly joined with the other defendants; that she was not liable in such an action, but only, if at all, in equity; and that no intent to charge her separate estate was proved, &c.

The judgment was in the usual form, for the recovery by the plaintiff of the amount of the notes, and the costs of the action.

J. A. Millard, for the appellant.

R. A. Parmenter, for the respondent.

By the Court, HOGEBROOM, J. In this case the learned referee gave a personal money judgment against the appellant, a married woman, in an action at law, for a debt of her husband not benefiting her separate estate, upon a note of which she was simply indorser, or guarantor, for him, and in the proceedings in which action her separate estate was not specifically described, and to which separate estate the judgment made no allusion. The com-

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plaint was in the ordinary form, against the makers and indorsers of a note, except that it described in *hæc verba*, the appellant's indorsement, and by amendment embraced the further allegation that the appellant was the wife of Edward Babcock, "and, at the time of making her said indorsement, had, and still has, separate estate, and intended to charge her separate estate, by her said indorsements." The only proof of such intent produced at the trial was the character of her indorsements, which were as follows:

"For value received I hereby charge my individual property with the payment of this note.

ARMINA BABCOCK."

And the fact that, at the time, she had, and still owns, as her separate estate, a house and lot in the city of Troy, worth several thousand dollars, and that her co-defendants were insolvent. The referee does not find any such intent, nor that the indorsement was for the benefit of her separate estate; but, on the contrary, finds that "such notes were indorsed by the said Armina for the benefit of the said Stephen E. and Edward Babcock, she having no interest in the transaction."

Under these circumstances, I do not think this judgment can be sustained, for reasons which I proceed to give.

1. The common law disability of the wife to bind herself in any such way as is claimed to have been done by these indorsements is conceded. A question is raised whether the writing of the appellant upon the back of the notes amounts to an indorsement; but for the purposes of this case, I assume that it does. One of them clearly is so, because it directs the payment to be made to the secretary of the plaintiff. The disabilities attaching to coverture are not to be regarded as any further removed than they are by the married women's acts of 1848, 1849, 1860 and 1862; and the question is, whether these acts justify the

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judgment given in this case. While they are, perhaps, to be construed liberally to promote the objects intended, it must not be forgotten that their leading object was to benefit and protect married women, and not to expose their separate estates to new and increased dangers and liabilities.

2. Prior to the acts of 1860 and 1862, it was not supposed, so far as I know, (even under the acts of 1848 and 1849,) that married women could be made liable under an instrument like that now under discussion; certainly they could not be charged personally. In the leading case of *Yale v. Dederer*, (18 *N. Y. Rep.* 265,) repeatedly before the courts, it was held that the capacity of married women to bind themselves by their contracts is not enlarged by the acts of 1848 and 1849, and that a married woman having a separate estate does not bind it by signing a promissory note as surety for her husband. This case came again, and finally, before the Court of Appeals, (22 *N. Y. Rep.* 450,) where the court reached this conclusion: that in order to create a charge upon the separate estate of a married woman, the intention to do so must be declared in the very contract which is the foundation of the charge, or the consideration must be one going to the direct benefit of the estate. The court did not decide in what manner (otherwise than that it must be in the contract itself) this intention must be made to appear; whether by a specific mortgage, pledge or appointment of property specifically described, which was enforced in equity, in a direct proceeding to sell such separate estate, as had long been the practice of courts of equity (the common law courts not assuming jurisdiction of such a proceeding;) or whether a general declaration of an intent to charge, or of an actual charge upon, her separate estate, without in any way describing it, was sufficient. This decision was made in 1860, but without any reference to

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the act of that year, and of course without any to the subsequent act of 1862.

The act of 1860 (*ch. 90, § 3, as amended in 1862, ch. 172, p. 344*) empowered married women to bargain, sell and convey such real estate as they possessed as their separate property, *and to enter into any contract in reference to the same*, with the like effect in all respects as if they were unmarried. I observe in the statute no like provision in regard to personal property; but assuming that the power of a married woman was equally operative over her personal estate, one question would be, whether a *general* judgment affecting *all* her property, as well as that of her husband, in which she had an interest by reason of the conjugal relation, as her own separate property, would be proper. I think this is not answered by saying that the execution of the judgment can be controlled so far as to limit its enforcement to her separate property. The judgment itself should be such as not apparently to cover or affect any property other than that on which it is a lawful lien.

The broader and more important question, however, is whether the authority given to enter into any contract in reference to her real estate is practically carried out, in accordance with the intention of the law-makers, by an indorsement of a note saying she charges her individual property with the payment of the note. If she attempted to make a deed or conveyance of her property in such a way, it would be plainly illegal; and I think neither of the acts of bargain, sale or conveyance, which in a previous part of the same sentence she is empowered to make, would be well executed by a simple statement in writing, saying: "For value received I hereby bargain (or sell or convey) my individual property to A. B." It appears to me it would be rejected for indefiniteness, as well as for non-compliance with the forms of law. And I am strongly inclined to think the loose and indefinite language contained in this instrument is a decisive objection to its

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validity. "For value received" may possibly answer, however untrue it in fact is. "*I hereby* (that is, upon the back of a promissory note) *charge* (that is, mortgage, pledge or make liable,) *my individual property* (without describing it, without acknowledging the instrument, without recording it, without letting anybody know what property it covers, or whether it covers any,) *with the payment of this note.*" If she indorsed a hundred notes, to different persons, in the same way, which is to have the preference, according to the date when they were given, or according to the date when judgment is obtained? No *man*, I think, could legally mortgage or pledge his property in that way, and I doubt whether any *woman* can.

3. But it is said we are controlled by authority, on this subject, which we are bound to respect. In *Barnett v. Lichtenstein*, (39 Barb. 194,) the majority of the court went far enough to sustain the liability of the wife in the present case, putting it upon the ground that the words and intent of the statute were complied with by a charge made in this way and in this general form. But Justice INGRAHAM dissented, holding that, according to well settled rules of courts of equity, when a wife wishes to charge her real estate as security for her husband's indebtedness, she must do so by a mortgage or other proper charge of specific property, which is to be enforced as such. That she cannot contract a personal liability for her husband, and for his benefit, upon her note, without any consideration to herself; and that the effect of sustaining the doctrine of her liability, in the case under consideration, would be to place her in a worse condition than if sole, and to deprive her of the safeguards which the law has thrown around her to protect her property from the debts of her husband. Although this is a general term decision, it was made by a divided court, and cannot claim absolute authority in a condition of the law so new and unsettled, and so much the subject of conflicting decisions.

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It is directly opposed by a still later general term decision in the fourth district, made also by a divided court, (ROSEKRANS, J. dissenting,) in the case of *Kelso v. Tabor*, (52 Barb. 125,) where the attempt was made to recover upon the wife's note given for her husband's debt, and charging her estate in the same form as in the present case. Justice POTTER, delivering the opinion of the court, held that though not in terms, yet in principle, the case was decided by the case of *Yale v. Dederer*, (18 N. Y. Rep. 265, and 22 id. 450.) That the contract of a married woman is absolutely void at law; that the statutes of 1848 and 1849 have taken from the wife no disability of her coverture, because the consideration of the contract in question has no relation to her separate estate, and the note is no conveyance of any interest therein; that the question is not what she might do with money in hand, or by an executed instrument, under seal, in a form to bind real estate, but by an executory contract, not given for her benefit, in which she has no interest, which is void at law, and for the enforcement of which there is no adequate inducement for equity to step aside from the well established rules prevailing in that court; that the question is, whether the writing, which would be void at law as a contract, is made valid and binding by a direction that the indebtedness be charged upon her separate estate; that the action is also one at law, seeking a money judgment, and not equitable relief; and cannot succeed in that form, nor be turned into an equitable action, without violating the principles of pleading. (*Heywood v. City of Buffalo*, 14 N. Y. Rep. 540.)

I feel inclined to adopt the reasoning of the last mentioned case, rather than that of *Barnett v. Lichtenstein*, as more in accordance with the spirit of equity and the intent of the legislature; and to grant a new trial, in this case, substantially for the following reasons:

1st. That an action at law, seeking an ordinary pecuni-

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ary judgment, as upon a personal contract consummated by a judgment of that character, in the ordinary form, is not maintainable against a married woman who, without consideration, and without benefit to her separate estate, and simply as the surety of her husband, and for his accommodation, indorses his note.

2d. That the plaintiff, having received these notes upon a preëxisting indebtedness, is not entitled to protection as a *bona fide* purchaser for a valuable consideration.

3d. That as the attempted charge upon the wife's separate real property, in this case, was not founded upon any benefit to such estate, or upon any matter in which she had an interest, or on account of which she had received any consideration, there is no occasion or justification for any departure from the established principles and proceedings of a court of equity, which require, in order to make and enforce a valid charge, a specific description of the property, in the instrument creating the charge, executed according to legal formalities, and enforced in equity, under a complaint seeking as relief, not a general judgment, but the satisfaction of the charge out of the specific property subjected thereto.

4th. That section 3 of the act of 1862, chapter 172, empowering a married woman possessed of real estate as her separate property, to bargain, sell and convey the same, and to enter into any contract in reference thereto, with the like effect in all respects as if she were unmarried, refers to such modes and forms of bargain, sale and conveyance of real estate and contracts relative thereto, as were recognized as legal, and were in conformity with the law as expounded in judicial tribunals at the time, and does not sanction a contract or charge of the kind now under investigation.

5th. That section 7 of the act of 1862, chapter 172, authorizing a married woman to sue or be sued in all matters having relation to her sole and separate property, in

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the same manner as if she were sole, refers mainly to her right and liability to sue and be sued without having her husband joined with her, and does not intend to confound or overthrow the rules of law or legal proceeding which theretofore obtained in regard to the essential characteristics of such actions, or the kind of relief to be sought, or the mode in which it is to be reached.

6th. That the weight of authority is against the maintenance of the action in its present form.

I am therefore of opinion that the judgment should be reversed, and a new trial granted, with costs to abide the event.

New trial granted.(a)

[ALBANY GENERAL TERM, September 16, 1867. *Miller, Ingalls and Hogeboom*, Justices.]

(a) In *Lowree v. Babcock*, decided at the same term with the above case, the facts were the same; except that in that case the plaintiff was a *bona fide* holder for value, and there was no amendment of the complaint charging the ownership by Mrs. Babcock of a separate estate, and the intent to charge the same by her indorsement; but proof of such ownership of real estate was introduced, without objection. The court *held* that there was nothing in these facts which should vary the conclusion from that which was arrived at in the above case; and a similar judgment was rendered.

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BABCOCK.

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As a general rule, remedies upon the primary debt and upon the collateral security may be prosecuted at the same time, even to judgment and execution, though only one satisfaction can be obtained.

If an attempt be made to collect the judgment both upon the original and the collateral security, that can always be prevented, or remedied, by the order of the court.

There is no legal objection to pursuing remedies upon the primary and the collateral security simultaneously. Nor is it an effectual bar to the obtaining of a judgment upon the original demand, that the suit upon the collateral has been first put in judgment, and that one of the defendants in that judgment is the sole defendant in the action upon the original claim.

The true test is, has satisfaction been had? If so, all other proceedings will be stayed; if not, they will be allowed to be continued.

APPEAL by the plaintiff from a judgment entered upon the report of a referee, dismissing the complaint with costs.

The action was brought upon a check made by the defendant for \$421.54, dated December 21, 1863, payable to the plaintiff or order, at the Merchants and Mechanics' Bank, Troy.

The answer, among other things, alleged that the defendant gave the plaintiff a chattel mortgage upon the boat "Neptune," as collateral security for the payment of the check and other paper. That the plaintiff had converted the boat to its own use; that its value was about \$2000; and that the boat, at the time of its seizure under the mortgage, was worth more than the amount due on the check and the other paper; so that said check was thereby paid.

On the trial the execution of the check, and its dishonor and notice thereof to the defendant, were proved, and were found by the referee. The plaintiff, simultaneously with the commencement of this action, commenced another action in this court against the present defendant, Armina his wife, and Stephen E. Babcock, upon three promissory

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notes, each dated December 30, 1863; two of which, one being for \$1000 and the other for \$700, were made by Stephen E. Babcock and indorsed by this defendant and his wife, Armina; and the third, for \$600, was made by this defendant and indorsed by Stephen E. and Armina Babcock. The indorsements of Mrs. Babcock were special, in the form stated in that case.^(a) That action was referred to the same referee who heard this case; and the pleadings, and the facts found by him, therein, were made a part of this case. Each of the answers, in that action, alleged, specifically, the consideration of those three notes. Although it was not claimed in such answers that any of those notes were collateral to the check, yet it was distinctly alleged that \$600 of the note for \$1000 was a part of the purchase price of a boat called the "Nettie Van Oercook," bought by Stephen E. Babcock; and that the remaining \$400 of such note was collateral security for a check of the same amount, given by Edward Babcock to the plaintiff. On the trial of those actions it was proved that \$600 of the \$1000 note was a payment towards the "Nettie Van Oercook," and that the remaining \$400 of such note was collateral security to the check sued on in this action. Although the referee, in his report, made no allusion to this note being *collateral* to the check, the fact was established by undisputed proof. The chattel mortgage mentioned by the referee, in his report in each case, was found by him to have been given as *collateral* to the *three notes sued on in the other action*. The mortgaged property was taken by the plaintiff, under the mortgage, and the referee decided, in the other action, that the plaintiff was chargeable in that action with the value thereof; and the sum of \$1226 was allowed to the defendants in reduction of the plaintiff's claims in that action. And for the balance of such claims, amounting to \$709.80, judgment was directed in favor of the plaintiff therein.

(a) See *ante*, p. 222.

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There was no allegation or proof that such judgment, or any part thereof, had been paid or satisfied.

R. A. Parmenter, for the appellant.

J. A. Millard, for the respondent.

By the Court, HOGEBOM, J. Although the referee has not found the fact, yet the uncontradicted proof establishes it, and the referee would doubtless have found it upon request, that the note prosecuted in the other action, so far as it covered four hundred dollars of the amount prosecuted for in this suit, was given as merely collateral thereto, and as additional security therefor, and not in payment or satisfaction thereof, or as a substitute therefor. As a general if not a universal proposition, remedies upon the primary debt and upon the collateral security may be prosecuted at the same time, even to judgment and execution, though but one satisfaction can be obtained therefor. (*Davis v. Anable*, 2 Hill, 339. *Hawks v. Hinchcliff*, 17 Barb. 492, 504. *Butler v. Miller*, 1 N. Y. Rep. 496, 500, 501.) If an attempt be made to collect the judgment both upon the original and the collateral security, that can always be prevented, or remedied, by the order of the court. This seems to be the only question in the case, and to have been momentarily confounded with an attempt to collect at the same time the same debt in two different actions.

Although it most generally happens that the remedies upon the primary and the collateral security are not simultaneously pursued, yet I see no legal objection to their being so pursued. Nor is it, in my opinion, an effectual bar to the obtaining of a judgment upon the original demand, that the suit upon the collateral has been first put in judgment, and that one of the defendants in that judgment is the sole defendant in the action upon the original

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claim. If the actions were properly commenced at the same time, the accidental fact that the action upon the collateral has first culminated in a judgment, cannot render nugatory the proceedings in the other action. And although the defendant Edward Babcock has not appealed from the judgment upon the collateral security, he may yet do so; or, for various other reasons, it may happen that satisfaction of the debt will never be obtained in that action. The true test is, has satisfaction been had? If so, all other proceedings will be stayed; if not, they will be allowed to be continued.

No question arises upon the pleadings. They do not contain, as originally they could not have contained, a statement of the judgment in the collateral action; but they could have been properly amended, or supplemental pleadings allowed, to justify the introduction of the subsequent evidence; and as it was introduced without objection, it will be regarded as admissible under the pleadings, or the pleadings be amended for such purpose.

I think the judgment should be reversed, and a new trial granted, with costs to abide the event.

[ALBANY GENERAL TERM, September 16, 1867. *Miller, Ingalls and Hogeboom*, Justices.]

MARY LOUISA VAN TUYL and others *vs.* OTTO W. E. VAN
TUYL, CATHARINE TAYLOR and others.

A valid marriage, to all intents and purposes, is established by proof of an actual contract, *per verba de presenti*, between persons capable of contracting, to take each other for husband and wife; especially where the contract is followed by cohabitation.

No solemnization or other formality, apart from the agreement itself, is necessary.

Nor is it essential to the validity of the contract, that it should be made before a witness.

Yet a contract, *per verba de presenti*, constitutes marriage only when the parties intend that it shall do so without any subsequent ceremony. A proposition to cohabit as man and wife, with an assurance of a future marriage, would be a nullity.

In a partition suit between the children of the husband by his first wife, and his children by a woman claiming to have been his second wife, the latter is a competent witness in behalf of her children, to prove their legitimacy.

The rule excluding the testimony of the wife, as to her husband's declarations to her during the existence of the marriage relation has no application to words spoken at the very time of forming the marriage.

The fair construction of section 899 of the Code of Procedure is, that when adverse rights by succession are involved, one litigant shall not testify to a transaction with the deceased predecessor in title, invalidating or impairing the right or title of the other.

The declarations of the husband, made in promiscuous conversations having no reference to his relations with his wife, or to the *status* of her or her children, are inadmissible as evidence.

MOTION for a new trial. The action was brought for a partition of the real estate of William Taylor, of Rye, Westchester county, deceased. The plaintiff, Mary Louisa Van Tuyl, and the defendants, Sophia Jane Van Tuyl, Maria E. Taylor and Isaac V. Taylor, were his children by a former marriage, and claimed to be his sole heirs at law, and sought in this action to exclude the defendant Catharine Taylor and her children from sharing in said estate.

The defendant Catharine Taylor claimed to have been the wife, and to be the widow, of Mr. Taylor, and entitled to dower, and that her children, the issue of such marriage,

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were entitled to share as heirs at law with the children of the former marriage.

No ceremonious marriage had been solemnized between Mr. Taylor and Catharine Taylor. She had been living as a seamstress in his family. After the decease of his former wife, he offered marriage to Catharine, which she rejected; but he persisted, and forcing himself into her bedroom repeatedly renewed the offer. He said that he wanted to get married, but that it would not be the thing for him to get married publicly, on account of the recent death of his wife, and the opposition of his family. She objected that her bedroom was not a fit place for a private conversation. He asked her if she would object to cohabit with him, and be a wife to him. She said she was unwilling, because she did not think it right, where there was not a ceremony of marriage performed. He said it was not necessary that there should be a ceremonious marriage. That in law it was just as binding a marriage between them alone, with God to witness, as any bishop or minister in New York could make it. That if they made an agreement between themselves to live in that state as man and wife, and be true to each other, it would be as legal a marriage as though a public ceremony were performed. She finally consented to receive him as her husband, and they secretly cohabited together, in the house at Rye, for some time. She subsequently left his house, and went to live at Harlem, in a house furnished her by Mr. Taylor. She did not return to Rye, but continued to reside at Harlem, under the name of Mrs. Johnson. She frequently introduced Mr. Taylor to her friends as her husband, and he recognized her as his wife, before them. These facts were kept from his family at Rye by his request, and it was for the same reason that she used the name of Johnson.

On the trial, Catharine Taylor was called and examined as a witness, to prove these facts, on behalf of the infant

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children of such alleged marriage, although the plaintiff, and the other defendants raised the objection that she was incompetent, under section 399 of the Code of Procedure.

The declarations of Mr. Taylor to his family at Rye, and others, that he was not a married man, were excluded by the court.

Robert Cochran, for the plaintiff.

Abel Crooke, John B. Haskin and S. E. Lyon, for the defendant Catharine Taylor.

GILBERT, J. I wish it was in my power to aid the plaintiff's counsel in their efforts to take away from our law, respecting the marriage contract, the reproach imputed to it. But that task belongs to the legislature, and not to the judiciary. As the law stands, a valid marriage, to all intents and purposes, is established by proof of an actual contract, *per verba de præsenti*, between persons of opposite sexes, capable of contracting, to take each other for husband and wife; especially where the contract is followed by cohabitation. No solemnization, or other formality, apart from the agreement itself, is necessary. (*Clayton v. Wardell*, 4 N. Y. Rep. 230. *Cheney v. Arnold*, 15 id. 345. *Caujolle v. Ferrie*, 23 id. 106, and cases cited. See also *Hubback on Successions*, ch. 4, § 1.)

Nor is it essential to the validity of the contract, that it should be made before a witness. This was held, in so many words, by Bradford, surrogate, in *Tummalty v. Tummalty*, (3 Bradf. 372.)

A written instrument being such contract, is, of course, admissible and proper evidence. Thus in England, the original contract is deemed the proper evidence of a Jewish marriage, (*Horn v. Noel*, 1 Camp. 61;) and letters or other written declarations or acknowledgments, expressive

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of the requisite consent, are at least evidence of, if they do not, *proprio vigore*, constitute, marriage. (*Dalrymple v. Dalrymple*, 2 Hagg. C. R. 59.) Before the change in the law, whereby parties to suits are permitted to testify in their own behalf, the actual making of a contract resting in parol might not be susceptible of proof; but this did not render it invalid or inoperative, for it might still be established by circumstantial evidence. (*Authorities supra.*) I am therefore unable to perceive any error in the charge to the jury on this subject.

It is urged, however, that it being a part of the agreement proved in this case, that the marriage should at some time thereafter be solemnized in church, the same was void, because the contract, *per verba de præsenti*, constitutes marriage only when the parties intend that it shall do so without any subsequent ceremony. This rule of law is probably correct, for the reason stated by Lord Campbell in the *Queen v. Willis*, (10 Cl. & F. 534,) that "it is easy to conceive that parties might contract *per verba de præsenti* without meaning instantly to become man and wife." And it was with reference to this principle that the court, upon a request of the counsel for the plaintiffs, instructed the jury to find that "if a proposal of marriage was made by Mr. Taylor—if he understood it as a proposal of marriage, and it was so understood by her, and she accepted that proposal—it was a valid contract of marriage." If, on the other hand, as is contended on the part of the plaintiffs, this was a proposition to cohabit as man and wife, with an assurance of a future marriage, it would be a nullity. The law requires an actual meeting of the minds of the parties upon that question, namely, that they shall thenceforth, from the time of making the agreement, be husband and wife. The point was fairly met, and, upon the evidence, was one for the jury to determine.

The contract of marriage was proved by Mrs. Taylor alone. Was she a competent witness? The rule invoked

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by counsel, excluding the testimony of the wife, of her husband's declarations to her during the marriage relation, has no application to words spoken at the very time of forming the marriage. That rule rests upon public policy, which invests communications between husband and wife, during marriage, with a confidential character. (*Chamberlain v. The People*, 23 N. Y. Rep. 89.)

The objection to the witness was placed upon the ground of her incompetency generally. She was admitted as a witness only in behalf of her children, to prove their legitimacy. This was excepted to, but no objection was made to any specific portions of her testimony in favor of or against any parties other than her children.

There can be no doubt that by the common law she was a competent witness either to bastardize the issue of the supposed marriage, or to establish their legitimacy. (*Rex v. Bramley*, 6 T. R. 330. *Goodright v. Moss*, Cowp. 593.) In the last case Lord Mansfield said, in reference to the competency of the parents: "I should as soon have expected to hear it disputed whether the attesting witness to a bond could be admitted to prove the bond." And he mentions a case where a mother was allowed to prove a clandestine marriage at the Fleet. No other evidence was given to show the legitimacy of the child, and a great estate was recovered upon her single testimony. By the enactment of the Code the legislature certainly did not intend to abrogate or restrict this rule. They removed all disqualification on the ground of interest. (§ 389.) They then allowed the examination of a party on behalf of a co-party, as to any matter in which he is not *jointly* interested with such co-party. (§ 397.) The matter as to which Mrs. Taylor testified was the legitimacy of her children, the marriage being only a link in the chain of evidence to establish that fact. Surely she was not, in a legal sense, interested with her children *jointly* in that matter. The language of section 399 is a little obscure, but I cannot

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think that the legislature intended to exclude testimony in a partition suit, in favor of one set of heirs, because it might operate against another set. The enacting clause of this statute is general. The exception is of an examination of a party *against* an heir at law, when the examination or judgment in the action can affect the interest of *the witness*. I do not think that the testimony of one tenant in common, in a partition suit, ought to be regarded as being against a co-tenant, within the meaning of this section. The fair construction of it is, that when adverse rights by succession are involved, one litigant shall not testify to a transaction with the deceased predecessor in title, invalidating or impairing the right or title of the other. In this case, too, the interests of the parties are separate and distinct. In ejectment by one heir of the deceased Mr. Taylor against another heir, the testimony of Mrs. Taylor as to transactions with her husband would have been competent. Her competency ought not to be affected by making her a party to a suit like this, where the same question is involved. Such a construction would put it in the power of any person, by bringing a partition suit, to deprive his adversary of testimony admissible in itself, on the mere ground that the witness is a nominal party to the suit, although not legally interested in the subject matter thereof. A suit in partition is based upon the fact that all the parties to it have undivided, but divisible, interests in the subject thereof, the end sought being a division merely. Where it is sought to embrace in such a suit the elements of an action of ejectment, or of a writ of right, especially where, as in this case, special issues have been framed for the trial of the latter, the legal rights of the parties, in relation to this subject, can be protected only by giving this section of the Code a corresponding construction, and by treating those averments which raise contestation upon the legal title, and the issues framed thereupon, as in legal effect a separate proceed-

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ing, within the meaning of section 399 of the Code. And this is in accordance with the rule that a proviso is construed strictly. It "carries special exceptions only out of the enacting clause; and those who set up any such exception must establish it as being within the words *as well as within the reason thereof.*" (*Per Story, J., United States v. Dickson*, 15 Peters, 165.)

The only remaining question is, whether the exclusion of the declarations of Mr. Taylor, made in promiscuous conversations, having no reference to his relations with Mrs. Taylor, that he was not a married man, was erroneous. Such declarations do not come within the rule relating to hearsay on the subject of pedigree, for none of them were spoken with reference to the *status* of Mrs. Taylor or her children. For the same reason, they are not admissible as part of the *res gestæ*. To be admissible on the latter ground, they must be connected with the act or transaction in controversy. None of the cases cited by the plaintiffs' counsel furnish an exception to the rule. In those from the surrogate's court, the declarations were of a character, or made under circumstances, clearly indicating that they related to the individual whose *status* was in controversy. In *Clayton v. Wardell*, (4 N. Y. Rep. 230,) and *Matter of Taylor*, (9 Paige, 611,) the rule stated was clearly announced; and in *Jewell v. Jewell*, (1 How. U. S. Rep. 119,) the Supreme Court of the United States recognized and applied the same principle.

If the foregoing views are correct, no error was committed, upon the trial, and I see no reasonable ground for complaining of the verdict. So far from being against the weight of evidence, it is fully supported thereby. Although the court might not have given full credence to the testimony on which it rests, or might have come to a different conclusion from the jury upon other grounds, that, in my judgment, affords no proper reason for dis-

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turbing the verdict. It must appear that a fair trial has not been had, or that errors have been committed by the court or jury, affording a reasonable doubt as to the justice of the result. (*Forrest v. Forrest*, 25 N. Y. Rep. 510.) Where the evidence so strongly preponderates as to justify only one conclusion, it is the duty of the court, on the trial of special issues, to instruct the jury as to the posture of the case, upon the evidence. (*Mountain v. Bennett*, 1 Cox, 353.) Where the evidence is such as to render such a course improper, but the case is one peculiarly within the province of a jury to determine, it is equally the duty of the court to submit the whole case to them, and to abstain from any interference with their verdict honestly given. Such was this case. To send it back for a new trial would be contrary to a due administration of justice, by unwarrantably prolonging a controversy which it is the right of the parties and the interest of the public to have terminated.

The motion for a new trial must be denied, and judgment upon the verdict must be entered, declaring the rights of the parties, and referring it to John W. Mills, Esq., to take proof of title, incumbrances, &c.

A clause may also be inserted appointing Calvin E. Pratt receiver, upon his giving the security, and subject to the directions verbally stated by me.

[KINGS SPECIAL TERM, January 4, 1869. *Gilbert*, Justice.]

GOODYEAR vs. VOSBURGH.

It is well settled, in this State, that standing trees form a part of the land, and as such, are real property.

An owner in fee of the land has the same estate in the trees as in the soil, unless there has been a severance of ownership by such a conveyance as is adequate to effect it.

An instrument in writing by which a lessee for lives, of land, assumes, with the assent of the lessor, to convey to a purchaser all the wood and timber thereon, with authority to the purchaser, at any time thereafter, to enter upon the premises and take off the same, covers such an *interest in land* as constitutes a freehold estate.

No writing less than a deed legally executed is sufficient to divest the grantor of such an estate.

If the instrument by which it is attempted to be conveyed is not attested by at least one witness, it will not take effect, as against a purchaser or incumbrancer, until it is properly acknowledged by the grantor.

The case of *Warren v. Leland*, (2 Barb. 613,) distinguished from the present case.

APPEAL by the defendant from a judgment entered upon the report of a referee.

The action was brought to recover the value of a quantity of pine timber and logs cut by the defendant, and which were claimed by the plaintiff. The referee reported in favor of the plaintiff.

L. L. Bundy, for the appellant.

H. Sturges, for the respondent.

By the Court, PARKER, J. This action was brought to recover the value of a quantity of pine timber cut by the defendant, which the plaintiff claims to own. It was tried before a referee, who found in favor of the plaintiff, and ordered judgment for \$60, damages, besides costs; from which judgment the defendant appeals.

The facts, so far as material, in the view I take of the case, are as follows: The plaintiff claims the timber in question by virtue of a sale of the same to him and Peter

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Collier, now deceased, by one John Beames, who was lessee of the land on which the timber was standing, under a lease made to him by Goldsboro Banyer, on the 24th day of November, 1812, for the term of three lives then in being, two of which still subsist. The instrument in writing by which the sale was made was dated February 13, 1833, and purported to convey all the wood and timber on about fifty acres of the land covered by the said lease, with authority to the said vendees thereof, at any time thereafter to enter upon the premises and take off the same. It purported to be signed and sealed by said Beames, and to be witnessed by James G. Walley. The referee found that the signature of James G. Walley (who, at the time of the trial, was deceased,) was not genuine, and that he was not a subscribing witness to the instrument. On the 1st day of January, 1867, the said Beames acknowledged the execution of the instrument, before a proper officer. Peter Collier died in 1846, intestate, leaving him surviving one child and sole heir at law, a daughter, who was married to the plaintiff in 1822, and who is still his wife, and by whom he has living issue. It also appears that on the 11th of November, 1833, Beames assigned the said lease, under his hand and seal, to said Collier & Goodyear.

The defense rests upon an alleged title in the defendant's wife to the *locus in quo*, under whom the defendant acted in cutting and taking off the timber in question. Such title is made as follows: On the 3d day of January, 1837, the said Beames gave a quit-claim deed of seventy-one acres, comprising the premises on which the timber was cut, to E. R. Ford. On the 4th of April, 1864, Ford and wife conveyed the same to E. C. Hodge, and on the 1st of April, 1867, Hodge conveyed to the defendant's wife. Under these conveyances she claims the leasehold estate in the premises.

On the 1st of May, 1865, G. S. Banyer (who had suc-

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ceded to the interest of the lessor) conveyed the premises on which the timber stood, to John Beames, Jr., and Dewitt C. Beames, subject to the said original lease, also to the said deed of seventy-one acres to said Ford, also subject to all claims of Collier & Goodyear, or Jared Goodyear, and also subject to all deeds, conveyances, contracts and sales made by said John Beames or his assignees, of said premises, or any part thereof. On the 11th of March, 1866, the said John and Dewitt Beames conveyed said seventy-one acres to the defendant's wife, subject to the same incidents as in said deed to them.

None of these deeds or instruments appear, from the evidence or findings, to have been recorded, except as follows, viz: the deed of 3d of January, 1837, from Beames to Ford, on the 16th of January, 1837; the deed of 4th April, 1864, from Ford and Hodge, on the 11th of June, 1864; the deed of 1st April, 1867, from Hodge to the defendant's wife, in February, 1868; the deed of 1st May, 1865, from G. S. Banyer to John and Dewitt Beames, on the 3d of July, 1866; and the deed of 11th March, 1866, from John and Dewitt Beames to the defendant's wife, on 9th of April, 1866.

The referee finds that Ford, when he took said deed, to him, knew that Collier & Goodyear claimed to have bought the timber on said piece of land, on which the same was cut by the defendant.

The question of Beames' right, as lessee, to sell the timber in question, is disposed of by the fact found by the referee, that his lessor had recognized, and in effect ratified, the sale, so far as his interests were concerned.

The leading question in the case, as here presented, is, whether the interest in the wood and timber purchased by Collier & Goodyear, under the instrument in writing dated February 13, 1833, was such an *interest in land* as constituted a freehold estate, or not. The learned referee held that it was not, and therefore that the conveyance

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thereof, although there was neither subscribing witness to the instrument, nor acknowledgment thereof, was sufficient to convey the title to the vendees, at the time of its execution. This holding I am constrained to think erroneous. If the doctrine of the case of *Warren v. Leland*, (2 Barb. 613,) can be maintained, this case is essentially different, inasmuch as the instrument of sale clearly contemplates the transfer, not only of all the wood and timber then standing upon the premises, but of the right to its occupancy and growth upon the premises, in perpetuity; for it expressly gives the vendees the right *at any time* thereafter to enter upon the premises and take off all the timber and wood within the bounds that day marked out. The doctrine of the case above cited, that a sale and conveyance of growing trees is not the conveyance of a freehold estate, and may be made by an instrument in writing not under seal, is thus qualified by the court making the decision: "These observations are to be deemed applicable to a conveyance of the growing trees standing on the land at the time of the conveyance, and not to a conveyance of an interest in any future trees which may grow on the land; which might embrace an exclusive interest in the soil so far as may be necessary for the support and nourishment of the trees; and these observations ought, perhaps, also to be qualified by an application of them to a conveyance of growing trees, in prospect of their separation from the soil *within a reasonable time*." The decision in that case was not intended, therefore, to reach such a case as this; so that it is unnecessary here to discuss the question of its soundness.

It is well settled, in this State, that standing trees form part of the land, and as such are real property. (*Green v. Armstrong*, 1 Denio, 550. *McGregor v. Brown*, 6 Seld. 117. *The Bank of Lansingburgh v. Crary*, 1 Barb. 542. *Vorebeck v. Roe*, 50 id. 302. *Warren v. Leland*, 2 id. 613.) An owner in fee of the land has the same estate in the trees

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as in the soil; unless there has been a severance of ownership by such conveyance as is adequate to effect it.

Now, although, in the case at bar, the grantor of the trees had but an estate for lives in the land, his conveyance of the trees purported to convey the entire interest in them, with the right of their indefinite continuance on the land. If he had the power to make such a conveyance—which is not here questioned—the question now is, did he, by the instrument which he executed, make a conveyance which became operative, as against Ford, prior to his conveyance to him, as above stated?

The statute provides that “every grant in fee of a freehold estate shall be subscribed and sealed by the person from whom the estate or interest conveyed is intended to pass, or his lawful agent; if not duly acknowledged previous to its delivery, * * its execution and delivery shall be attested by at least one witness; or, if not so attested, *it shall not take effect* as against a purchaser or incumbrancer, until so acknowledged.” (1 R. S. 738, § 137.)

There can be no doubt, I think, that the interest or estate which the instrument of sale purported to grant, in the trees, was at least a freehold estate. The entire interest in this portion of the land was, by the terms of the deed, granted. If, instead of the trees, it had been the soil so granted, there would be no doubt that it would have been a grant of at least a freehold estate. The subject matter of the grant being the trees, confessedly a part of the land, I cannot see how the estate granted, in this part of the land, is less than if it were the soil.

Even if, by a legal fiction, the grant operates to effect a severance of the trees from the soil, so as to render them henceforth personal property, still the estate which passed from the grantor is no less a freehold estate than if no such effect was produced; and no writing less than a deed legally executed is sufficient to divest the grantor of such

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estate. That the estate, when it reaches the grantee, is transmuted, by fiction of law, into personal property, can have no effect upon the requirement of the statute above quoted. This reasoning seems to me sound, although it conflicts with the decision in *Warren v. Leland*. But, as above shown, it is not necessary to resort to it in this case, in view of the extent of the grant, which, even under the case of *Warren v. Leland*, is clearly within the terms and effect of the statute above cited.

The result then is, that the conveyance of the trees to Collier & Goodyear did not *take effect*, as against Ford and his grantees, until January 1, 1867, when it was acknowledged by Beames. Prior to that time, Beames' interest in the premises, through his conveyance to Ford and the subsequent *mesne* conveyances, had vested in the defendant's wife. So that the failure of the conveyance to "*take effect*," as against these purchasers, until after their titles had accrued, left the plaintiff with no title, as against the defendant.

This view of the effect of the instrument of sale to Collier & Goodyear disposes of the case, and shows that judgment should have been given for the defendant.

The judgment appealed from must be reversed, and a new trial granted; costs to abide the event.

[BROOME GENERAL TERM, January 26, 1869. *Baloom, Boardman and Parker*, Justices.]

THE WAVERLY NATIONAL BANK vs. MARY A. HALSEY and others.

Where debtors, immediately before making an assignment for the benefit of creditors, bought merchandise which they did not intend to pay for, but which they sold on credit, and assigned the debt owing for the price to the assignee; and at the time of making the assignment retained a large amount of money from the assignee, for their own use; and allowed moneys to be retained by clerks, fraudulently, either for their own use or for the benefit of the assignors; *Held* that these facts, unexplained by the debtors, were amply sufficient to warrant a finding that the assignors were actuated by a fraudulent intent in making the assignment; and that in the absence of any proof explaining the presumption of fraud arising from such acts, it was the duty of the court below to have so found.

A PPEAL from a judgment of the special term, dismissing the plaintiff's complaint.

The action was tried before a justice of this court, at the February special term, 1868, without a jury.

On the trial the justice found the following facts: 1st. That the plaintiff is a corporation under the laws of the United States, and of this State. 2d. That on May 11, 1866, the plaintiff recovered a judgment in this court against Mary A. Halsey and Oscar P. Northum, two of the defendants, for \$20,793.69, which judgment was recovered upon the drafts mentioned in the complaint, and was docketed, as stated in the complaint; that execution upon such judgment was issued to the sheriff of the city and county of New York, and was returned unsatisfied. 3d. That by an assignment in writing, dated October 30, 1865, and acknowledged October 31, 1865, the said Mary A. Halsey and Oscar P. Northum assigned over to the defendant Albert L. DeCamp all their property in trust to pay, 1. The expenses of the execution of the trust. 2. Certain of their debts as copartners in full. 3. All their debts as copartners, *pro rata*, and, 4. All their individual debts. That on the 31st day of October, 1865, they filed an inventory of their property, which purported to have been made by Oscar P. Northum, one of such assignors.

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4th. That at the time of the said assignment, and for several years prior thereto, the said Mary A. Halsey and Oscar P. Northum were copartners in business, under the firm name of "Halsey & Northum," transacting business as produce commission merchants in said city; that as such copartners the said assignors, at the time of the said assignment, had a large amount of money which was not then, and has not since been, delivered to their said assignee, and was not mentioned in the inventory filed by them, and which they intended fraudulently to conceal, and did fraudulently conceal, both from their creditors and their assignee; and that the money so concealed was the result of collections made in contemplation of the assignment; and that the possession of the money was attempted to be concealed, a portion of it by false entries in the books of the assignors, and a portion of it by being put or left in the hands of third parties, upon secret trusts for the use of the assignors.

5th. That a few days before the assignment the assignors fraudulently bought merchandise to a considerable amount on credit, which they did not intend to pay, and never have paid, for; that the property so fraudulently purchased was immediately sold by them to a third party without their receiving payment therefor, and the debt owing to them for the price thereof was assigned over by them to their assignee by said general assignment, with their other assets, which debt was embraced in the said inventory filed by them.

6th. That at the time and immediately before the said assignment, one Tarbox was the book-keeper of said assignors; that as such he received of moneys belonging to them from one James Dill, the sum of \$1062.50, which they (being at the time contemplating such assignment) fraudulently allowed him to retain, and charge to himself on their books; and the said Tarbox did, pursuant to such fraudulent direction, retain the said amount and charge himself therewith, he being at the time insolvent.

7th. That at and immediately before the

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assignment one James Wickham was one of the employees of the said assignors, as salesman. That as such employee he had collected of the moneys of the assignors within a few days before the assignment, and while the assignors were contemplating the same, the sum of \$4431.39, which money the said assignors fraudulently allowed the said Wickham to retain, either for himself or in secret trust for their benefit, and charged the same to him upon their books, and embraced the debt against him in their inventory as part of their assets, the said Wickham being insolvent at the time. These frauds, in the aggregate, amounted to over \$30,000. 8th. That DeCamp, the assignee, accepted the said assignment on the 31st day of October, 1865. That he had no knowledge or notice of the fraudulent intent of the assignors, but accepted the same in good faith. 9th. That after the said assignment the books of account and all the visible assets assigned were left by DeCamp in the place of business occupied by the said assignors at the date of said assignment, and the said Tarbox was continued by said DeCamp as book-keeper in charge of said books, until about the first day of January, 1868. To the conclusion of the presiding justice, that the defendant DeCamp had no knowledge of the fraudulent intent of the assignors, the plaintiff's counsel duly excepted; also to the conclusion that DeCamp, the assignee, accepted the assignment in good faith; and to the conclusion that the assignment was delivered on the 31st of October, 1865.

The presiding justice found the following conclusions of law: 1st. That the said assignment was valid. 2d. That the same was not made with intent to defraud creditors. 3d. That the complaint in this action must be dismissed. To each of which conclusions the plaintiff's counsel duly excepted.

Judgment having been entered upon such decision, in favor of the defendants, the plaintiffs brought this appeal.

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Wm. M. Tweed, Jr., and Nelson Smith, for the appellants.

I. Upon the evidence and facts found by the court, the assignment was clearly fraudulent and void, and the court erred in dismissing the plaintiff's complaint. (1.) It is provided by 2 Revised Statutes, 137, section 1, that "every conveyance or assignment in writing or otherwise, of any estate or interest in lands, or in any goods or things in action, or of any rents or profits issuing therefrom, and every charge upon lands, goods or things in action, or upon the rents or profits thereof, made with the intent to hinder, delay or defraud creditors or other persons of their lawful suits, damages, forfeitures, debts or demands, and every bond and other evidence of debt, given, suit commenced, decree or judgment suffered, with the like intent, as against the persons so hindered, delayed or defrauded, shall be void." (3 *R. S.* p. 224, § 1, 3d ed.) (2.) It is the *intent* of the assignor by which the assignment is to stand or fall; honesty of purpose of the assignee has nothing to do with the question. (*Wilson v. Forsyth*, 24 *Barb.* 105-120.) The assignment must be free from all suspicion, and there must be an actual *bona fide* continued change of possession. (*Per Clerke, J., Wilson v. Ferguson*, 10 *How. Pr.* 175-180.) (3.) The acts of the assignors while in contemplation of making an assignment, are evidence upon the question of fraudulent intent. (*Per Balcom, J., Peck v. Crouse*, 46 *Barb.* 151-157. *Vance v. Phillips*, 6 *Hill*, 433. *Wilson v. Forsyth*, 24 *Barb.* 125. *Waterbury v. Sturtevant*, 18 *Wend.* 353.) Contemporaneous fraudulent acts are also admissible upon the question of intent. (*Angrave v. Stone*, 45 *Barb.* 35.) In this case a fraud occurring three months before the assignment, was held admissible, by the general term in this district. Contemporaneous frauds are admissible in evidence, upon the theory that all of the fraudulent acts of the assignors which they have in contemplation constitute but one general scheme of fraud; and that an assignment in contempla-

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tion while such fraudulent acts are being perpetrated, forms part of the scheme, and when made, is a hindrance to creditors in attacking the other fraudulent acts of the assignors that immediately precede it; and is calculated to deter any such attack. On this principle, a mortgage upon personal property, executed with intent to deter creditors from attacking some other fraudulent act of the mortgagor, is fraudulent, though executed for a valuable consideration, or to secure an honest debt. (*Dwelly v. Van Houghton*, 4 N. Y. Leg. Ob. 110. *Wilson v. Ferguson*, 10 How. Pr. 175.) Considerable latitude is allowed in proving contemporaneous fraudulent acts and circumstances. (*Hubbard v. Briggs*, 31 N. Y. Rep. 538. *Booth v. Bunce*, 33 id. 139.) (4.) The badges of fraud or fraudulent acts of assignors committed while contemplating the assignment in question, and with the view of making it, are divisible into three distinct classes. Under the first of such classes we embrace the fraudulent purchase by the assignors of the bill of butter of Miller and others, on the 27th day of October, 1865, three days before the assignment, not intending to pay for it, and the sale the next day of this butter to Redfield, and the assignment of the claim for the butter against him to the assignee, to pay preferred creditors. This clearly shows a fraudulent scheme to accumulate a fund with which to prefer creditors. The assignors, the day before the purchase of this butter, closed their account with the Merchants' Exchange National Bank, where they kept their deposits, withdrew their balance, and were at the time, the court found, contemplating this assignment. The fruits of that fraud were carried into the assignment by actually putting the claim arising on the sale by them of this butter into their assignee's hands, with the direction to pay it to preferred creditors. This must necessarily taint the assignment itself with such fraud, and render it void. *Kennedy v. Thorp*, (3 Abb. Pr. N. S. 131,) where it was decided by

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the common pleas general term that such a fraud rendered the assignment void; Judge Cardozo having so held at the trial of that case, and Judge Brady writing the opinion at the general term. (5.) Under the second of which classes we embrace the collection and retention by the assignors of a large amount of money which they had at the time of the assignment, and which was not mentioned in the inventory nor delivered to the assignee, and which, as the justice at special term found, the assignors intended fraudulently to conceal, and did fraudulently conceal, both from their creditors and their assignee, and that the possession of such moneys was attempted to be concealed by false entries in the books of the assignors, and a portion of it by being left in the hands of third parties on a secret trust for the use of the assignors, and that the assignors intended to keep such moneys, both from their creditors and assignee, for their own benefit. These moneys amounted to about \$29,000. The fraudulent retention of these moneys by the assignors, for their own benefit, clearly renders the assignment fraudulent and void. It is provided by 2 Revised Statutes, 136, section 5, (5th ed. 222,) that "every sale made by a vendor of goods and chattels, in his possession or under his control, and every assignment of goods and chattels, by way of mortgage or security, or upon any condition whatever, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things sold, mortgaged or assigned, shall be presumed to be fraudulent and void as against the creditors of the vendor, and shall be conclusive evidence of fraud, unless it shall be made to appear, on the part of the persons claiming under such sale or assignment, that the same was made in good faith, and without any intent to defraud such creditors or purchasers." Money is goods and chattels; so treated in law; and may be levied upon by virtue of an execution from a justice's court, running

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against goods and chattels only. (*Handy v. Dobbin*, 12 John. 219, 220. 1 Cranch, 133.) So are bank bills regarded as goods and chattels. (*Allen v. Sewall*, 2 Wend. 327.) The sale or assignment of personal property, unless accompanied by delivery and followed by continued change of possession, is, *prima facie*, fraudulent, and conclusively so when not shown to have been made in good faith. If no explanation is made, the question is one of law, and it is the duty of the court to pronounce the sale or assignment void. (*Murray v. Burtis*, 15 Wend. 212. *Griswold v. Sheldon*, 4 Comst. 581.) The retention of the possession of evidences of debt, or choses in action, by the vendor or assignor, was always presumptive evidence of fraud against creditors. (*Mead v. Phillips*, 1 Sandf. Ch. 83, 88, 89.) The non-delivery of the possession of property assigned, whether real or personal, independent of any statute, has ever since *Twinis' case*, (3 Coke, 80,) in the time of Elizabeth, been deemed a badge of fraud, and sufficient to avoid the assignment. Even *Wilson v. Forsyth*, (24 Barb. 105,) although full of *dicta*, and special pleading, will upon examination, be found, so far as it decides any question that was before the court, to sustain this principle. That case was not a creditor's bill. No execution had been returned *nulla bona*; it was no part of the remedy sought in that action to reach the assets of the fraudulent debtor, but merely a suit to set aside the debtor's assignment of all his property as standing in the way of an attachment of particular pieces of his real estate. Issues having been framed and sent to a jury, the circuit judge on the trial of those issues charged the jury, among other things, "that if Forsyth, the assignor, did not deliver over all his property to the assignee the assignment was void." (P. 110.) The charge was unqualified, that if the assignor did not deliver all his property to the assignee the assignment was void. It did not submit to the jury any question of the assignor's "intent" in withholding the possession of

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any part of his property; it did not purport to ask the jury as to the assignor's intent in not delivering his property. The charge, instead of treating the non-delivery to the assignee of a part of the debtor's property as a badge of fraud, and evidence of an intent thereby to defraud, unless there was some circumstance in the case to negative such intent, treated the non-delivery as conclusive evidence admitting of no apology or explanation, and the court, at general term, held this was error, (*see opinion of Judge Gould, 24 Barb. 128,*) and that is all it held, except that the action could not be sustained, either as a creditor's bill, because the plaintiff was not a judgment creditor, with an execution returned *nulla bona*, or as a suit to remove a cloud upon title, because the plaintiffs had no title. (*Judge Gould's opinion, 24 Barb. 119, 120.*) But the court did not hold that if the assignor (as has been found in this case) had fraudulently failed to deliver a very large amount of his property with intent to conceal and retain it for his own benefit, at the very instant of the assignment, such fraudulent retention would not have been sufficient to have avoided the assignment. It is true that Judge Gould, *obiter dictum*, went into some special pleading to show that an assignment, giving preferences of a part only of a debtor's property, was not for that reason fraudulent, (*opinion, pp. 121-127;*) and then he concludes that if an assignment, which upon its face is limited to a portion only of the debtor's property, is not for that reason fraudulent, one which, upon its face, assigns all his property is not necessarily rendered invalid because the debtor only delivers a part of the property assigned. In this dictum the learned judge failed to preserve the distinction between the two cases. When the assignment is expressly limited on its face to a part of the assignor's property, the balance, the part not assigned, is open to the execution of judgment creditors, as if no assignment had been made. But when the assignment is

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upon its face, of all the debtor's property, and only a part is delivered, then the part not delivered, being covered by the assignment, creditors are not at liberty to levy upon the part not delivered, unless they, for that reason, have a right to attack the assignment, and in such case the assignment stands as a cover to the part not delivered; and for this reason the non-delivery according to the assignment has ever been held a badge of fraud by the common law, and is, by our statute, (2 R. S. 137,) made conclusively so unless the non-delivery is explained, and the assignment shown to have been made in good faith. (6.) Under the third of such clauses or badges of frauds, we embrace the dispositions to Wickham and Tarbox; to the former of \$4431.39, and to the latter of \$1062.50, both of whom were insolvent at the time. These were distinct fraudulent acts of entirely a different character from the retention of the property by the assignors. They were not only in form the disposition of it to others, with the intent to defraud, but these dispositions had a much wider meaning. Tarbox was the book-keeper. It was he who made the false entries in the assignors' books; he knew all about the assignors' wrongful and fraudulent acts. Those fraudulent acts were crimes, and, like all crimes, sought concealment; it was therefore necessary to conceal them. How could that be done? We do not mean how could it be done successfully; but how did it appear to Northum that it could be done? We answer by bribing the book-keeper, Tarbox. The \$1062.50 did it. The next step was to select a friendly assignee; one who would, even though not himself guilty, defer to Northum's wishes. This was done, and De Camp was the man selected, for certainly he was on very intimate terms of friendship with Northum; so much so that just before the assignment he went with him as companion to Schuyler county. The next step in the scheme was to have the assignee keep the same book-

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keeper, Tarbox, in custody of the assignors' books of account, and it was done. In this way Northum expected to conceal his frauds, and so we submit this assignment was part and parcel of the fraudulent scheme made with the intent to hinder and defraud creditors, and to cover all the other frauds. (*Angrave v. Stone*, 45 Barb. 35.) Now, in respect to the fraudulent disposition to Wickham of \$4431.39, we call it a "disposition," although it was nominally in the form of a loan. Wickham was one of the assignors' clerks, and stood very much in some respects in the position of Tarbox. He must have known all about the fraudulent intent of the assignors, and what they were doing; he was Northum's father-in-law; he helped to collect the assignors' assets. Was insolvent at the time. He could not have collected and retained so much money of the assignors, and that too by Northum's consent, without knowing there was something wrong. The assignors could not have intended that the money that Wickham had, although it was embraced in their inventory as part of their assets, should ever be applied to the payment of their debts. Had they intended any such thing, why not hand their money over to the assignee, instead of giving it to Wickham, an irresponsible man. Assuming that this transaction, as the court has found, with Wickham, was fraudulent, and it makes as strong a case against the assignment as in *Litchfield v. Pelton*, (6 Barb. 188.) In that case the assignor sold all his property to one of his brothers, who was irresponsible, and took his notes, and then on the same day made a general assignment; and the court, Hurlbut, J., held that the sale and the assignment were to be regarded as parts of one scheme, and held the assignment void. (7.) The question is not whether the assignment could or did aid the assignors in their fraudulent scheme. But what was their intent in making it? If their scheme was fraud upon their creditors, as the court has found it was, and they made the

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assignment as part of the general scheme, thinking (even though mistakenly) that the assignment might either deter creditors from attacking their fraudulent acts, or the better to aid them to conceal their frauds or their false entries in their books, or with the intent to keep their books and the general subject of their dealings from their creditors, or for the purpose of having a friendly assignee who might defer to their wishes or deal leniently with any of their accomplices, Tarbox or Wickham, or others, or for any other purpose in which they had, or might have any interest, whether pecuniary or not. We say if any of these reasons operated in the minds of the assignors, then it is easy to see that they may have expected the assignment to aid their fraudulent scheme. (8.) We submit that some of these benefits have been realized by the assignors by making the assignment as they did. They obtained a friendly assignee; in this they were vitally interested, provided he might bring a suit against them as the court suggested, to unmask their fraud and recover of them the money which they fraudulently withheld. No such action has been brought; Tarbox, their willing tool, was retained as book-keeper, under the assignee. Wickham has not been molested, and probably never will be by De Camp. Wickham, Northum's father-in-law, was allowed by De Camp to occupy the assignors' store and use the office furniture and safe until the time of the trial, and generally to enjoy the good will of their business. The assignors have, in short, gained every advantage under De Camp that they could have expected under the most friendly assignee. Now, although these subsequent matters do not, in themselves, render the assignment void, yet they may be referred to with the view of divining with what intent the assignors acted in making it. (*Wilson v. Ferguson*, 10 *How. Pr.* 175, *per Clerke, J.*) (9.) The entire absence of any explanation of the assignors' conduct, should, in determining their intent, have a controlling effect. A fraudulent in-

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tent may as well be inferred from the want of a proper explanation of one's conduct as from affirmative proof. (*Newman v. Cordell*, 43 Barb. 461.)

II. The intentional failure of the assignors to embrace in their inventory a large amount of their moneys, as found by the court, especially when such omission was accompanied with the intent fraudulently to conceal the same, renders the assignment void. (*Laws of 1860, ch. 348, § 2.*) See also *Juliana v. Rathbone*, (7 Trans. Rep. 53,) where the Court of Appeals held that the omission to file an inventory as required by the statute, avoided the assignment, and that too when the omission was not through any fraudulent design. The statute, section 2, requires that the assignors shall file a full and true inventory of all such debtor's estate at the date of the assignment. Now, an inventory which fraudulently omits a large portion of the estate, is not only a non-compliance with the statute, but a fraudulent evasion. As to the property omitted, no inventory is filed; if the omission to file any inventory is fatal, then by parity of reasoning, one designedly false is so much the more so. The principle, although founded upon the statute declaring that a discharge granted to an insolvent debtor shall be void if he has fraudulently concealed the name of any of his creditors, or falsely stated the sum due them, is applicable. (*Small v. Graves*, 7 Barb. 578. *Ayres v. Scribner*, 17 Wend. 407.)

III. The judgment should be reversed, and judgment ordered in favor of the plaintiffs upon the findings of fact by the court. Another trial is not necessary, as there is no dispute about the facts.

Amasa A. Redfield, for the respondents.

I. It is not pretended that the assignment in question is void upon its face, as matter of law. It follows that, to sustain the action, the fact of a fraudulent intent in making it must be proven by evidence. And this must be an in-

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tent to defraud by making the assignment; not to defraud by some entirely independent act. (*Wilson v. Forsyth*, 24 Barb. 105. *American Exchange Bank v. Webb*, 15 How. Pr. 193.)

II. The facts proved on the trial are not such as in themselves constitute fraud; but to use the language of the court in *Wilson v. Forsyth*, (24 Barb. 103,) are such "as might, and probably would have been done, had no assignment been made or dreamed of;" therefore they are not proof of fraud in making the assignment.

III. The fraud, if any, must be in making the assignment. And there is no pretense that there was any fraud in that; but only that after making an assignment of all their property, the assignors failed to make a delivery of it all to the assignee. 1. The fact of a transfer of all their property cannot be denied, for such is the wording of the instrument. In the act of assignment there was good faith; and it is as to this act only that fraud can be predicated, or that the court can be asked to adjudicate. 2. If there was delay or fraud on the part of the assignors to deliver, under their assignment, the property assigned, the assignee has the right, and it is his duty, to sue for, or take other steps to get it in for the benefit of the creditors. This is no fraud on the creditors, therefore. (*McMahon v. Allen*, 35 N. Y. Rep. 403.)

IV. Since the decision in *Wilson v. Forsyth*, (24 Barb. 103,) and its approval by Davies, J., in *American Exchange Bank v. Webb*, (15 How. Pr. 193,) it seems settled law, that the fact that the debtor does not deliver all the property assigned (but absconds with it or appropriates it otherwise to his own use) does not of itself invalidate the assignment.

V. The badges of fraud relied upon by the plaintiffs may all be included in the one charge, that, although the assignors made a general assignment of all their property for the benefit of creditors, good upon its face, they with-

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held a part of it from the assignee. This is no proof of fraud. (*Wilson v. Forsyth*, 24 Barb. 103.)

VI. Even if failure to deliver to the assignee could be deemed an index or badge of fraud, the assignee must be proved a party to the fraud to make it effective to set aside the instrument. A delivery implies two persons, one to give, another to receive. A perfect delivery of property must be the act of two parties jointly. Fraud cannot be predicated of the giving by one and at the same time good faith in receiving by the other. (*Carpenter v. Muren*, 42 Barb. 300. *Newman v. Cordell*, 43 id. 448.) Now there is no pretense, at all events there is no proof, that Mr. DeCamp, the assignee, has been a party to any fraud alleged against the assignors. The judgment should be affirmed.

By the Court, INGRAHAM, P. J. The justice, upon the trial, found that the assignors, before and at the time of the assignment, had a large amount of money, which was not delivered to the assignee, or mentioned in the inventory, which they intended to and did fraudulently conceal from their creditors and assignee; that this money was the result of collections made in contemplation of the assignment, and its possession was concealed by false entries in the books. He also found that the assignors, within a few days of the assignment, fraudulently bought large amounts of merchandise which they did not intend to pay for, and which was immediately sold on credit, and the debt owing therefor was transferred to the assignee; and that clerks were permitted to charge themselves with moneys which they were allowed to retain, either for their own account or for the benefit of the assignors.

The justice held that notwithstanding these acts, the assignment was not fraudulent, and rendered judgment for the defendants.

I suppose it cannot be denied that if the assignors

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assigned property which was not delivered to the assignee, but was suffered, with the consent of the assignee, to remain in the possession of the assignors, the assignment would be fraudulent and void.

With the finding of such concealment of money by the assignors, both from creditors and assignee, for their own benefit, it is clear that part of the assigned property was retained by the assignors, and has not been delivered to the assignee.

In *Wilson v. Forsyth*, (24 Barb. 105, 121,) Gould, J., says: "Leaving the assignor in possession of personal property tends to show that the transfer was intended as a cover. It is this intention which makes the instrument void, and not the subsequent act." In *Griswold v. Sheldon*, (4 N. Y. Rep. 580, 588,) Bronson, Ch. J., says: "Such a transaction (leaving property in the hands of the debtor after mortgage or sale) the law always has and I trust always will pronounce a fraud upon creditors, and the judge should have so ruled, at the circuit." And in reference to the rule that such question of fraud should have been left to the jury, the court held that evidence to repel the fraudulent intent was necessary, and in the absence of such proof it was the duty of the court to set aside the verdict sustaining the assignment, as erroneous.

The purchase of goods with a fraudulent intent, and the transfer of the proceeds of such goods to the assignee, has been held, in *Kennedy v. Thorp*, (3 Abb. N. S. 131,) to indicate a fraudulent intent sufficient to vacate the assignment.

In *Work v. Ellis*, (50 Barb. 512,) Clerke, J., held, "if the assignors are actuated by a fraudulent intent, in making the assignment, it is void, whatever may have been the intent of the other parties." In *Cuyler v. McCartney*, (40 N. Y. Rep. 221, 226,) Woodruff, J., while holding that admissions made by the assignor, after assignment, are not admissible to prove the fraud, says: "If the intent was fraudulent, the assignees, however free from fraud them-

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selves, are not *bona fide* purchasers, but are affected by the fraudulent intent of the assignor. In the cases of *Wilson v. Forsyth*, (24 Barb. 195,) and *American Exchange Bank v. Webb*, (15 How. Pr. 103,) and *Miller v. Halsey*, (4 Abb. Pr. N. S. 28,) it is stated that the mere non-delivery of all the assigned property is not of itself sufficient to set aside the assignment; but some of those cases hold that such evidence is not proper to be considered in ascertaining the assignor's intent in making the assignment.

The facts in this case are, that the debtors retained a large amount of money from the assignee, for their own use; that they bought, immediately before the making of the assignment, merchandise which they did not intend to pay for, but which they sold on credit, and assigned the debt owing for the price thereof to their assignee; and that moneys were allowed to be retained by clerks fraudulently, either for their own use or for the benefit of the assignors.

These facts, unexplained by the debtors, are amply sufficient to warrant a finding that the assignors were actuated by a fraudulent intent in making the assignment, and in the absence of any proof explaining the presumption of fraud from such acts, it was the duty of the court to have so found. In *Ball v. Loomis*, (29 N. Y. Rep. 412,) the want of change of possession is said to be "conclusive evidence of fraud, unless rebutted by affirmative evidence of good faith, and the absence of an intent to defraud."

The finding in this case is against the weight of the evidence, and a new trial should be ordered.

Judgment reversed, and a new trial ordered; costs to abide the event.

[FIRST DEPARTMENT, GENERAL TERM, June 6, 1870. *Ingraham*, P. J., and *Cardozo* and *Geo. G. Barnard*, Justices.]

ELIZABETH M. CONKLING vs. J. ROMAINÉ BROWN.

On the 26th of October, 1848, B. M. died intestate, seised in fee of certain premises, leaving no widow or descendants him surviving, but leaving a sister, M. C. and a grand-nephew, A. M. W. his only heirs at law. M. C. and A. M. W. inherited the lands, as tenants in common, in fee, and afterwards made an amicable partition, by which the premises fell to the share of A. M. W., and a release of the same was made to him, by M. C., dated May 15, 1849. A. M. W. died November 22, 1849, seised in fee of his portion of said lands, intestate, unmarried and without descendants, and leaving no father, but leaving a mother, M. H. who, after the death of her first husband, the father of A. M. W., and during the lifetime of A. M. W., had married a second husband, G. H., by whom she had children, brothers and sisters of the half blood to A. M. W., but not of the blood of B. M. the ancestor of A. M. W., and who were living at his death.

- Held* 1. That A. M. W. and M. C., being tenants in common, each was seised solely or severally of his undivided share of the land; and all there was of unity between them was of possession, not of estate, in the land.
2. That such possession they could sever and divide, and assign to each his separate part by parol; and the releases which they executed effected nothing more. Neither acquired any new estate.
3. That upon the death of A. M. W., intestate, unmarried, without descendants, leaving no father, the fee descended to his mother, M. H., and to the exclusion of the brothers and sisters of the half blood of A. M. W., they not being of the blood of B. M., the ancestor of A. M. W.

THIS is a controversy submitted without action, pursuant to section 372 of the Code of Procedure, and the following is the case agreed upon:

Elizabeth M. Conkling and Thomas Pruden, made a contract in the words and figures following, to wit:

“Articles of agreement, made the 17th day of September, one thousand eight hundred and sixty-nine, between Elizabeth M. Conkling, individually, and as sole executrix of Jonas Conkling, deceased, of the first part, and Thomas Pruden, of the said city of New York, of the second part, in manner following: The said party of the first part, in consideration of the sum of five hundred dollars to her duly paid, hereby agrees to sell unto the said party of the second part, and the said party of the second part agrees to purchase all that certain piece or parcel of land, situate,

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and being on the westerly side of Seventh avenue, in the twenty-second ward of the city of New York: Beginning at a point on said westerly side of Seventh avenue, distant forty-one feet and six inches southerly from the south-westerly corner of Fiftieth street and Seventh avenue; thence southerly, parallel with Seventh avenue, thirty-three feet six inches; thence westerly, parallel with Fiftieth street, ninety feet; thence northerly, parallel with Seventh avenue, thirty-three feet six inches; and thence easterly, ninety feet, to the place of beginning; the party of the first part to remove the sheds, &c., now on said premises; for the sum of fourteen thousand five hundred dollars, which the said party of the second part hereby agrees to pay to the said party of the first part, as follows: Five hundred dollars on the execution and delivery of this contract, the receipt whereof is hereby acknowledged; seven thousand dollars in cash on the first day of November next, when the deed for said premises is to be delivered; and the balance, to wit, seven thousand dollars by the bond and mortgage of the party of the second part, or his assigns, on said premises, payable on or before the 1st day of November, 1872. The deed, and bond and mortgage to be delivered at the office of Thomas H. Barowsky, No. 14 Wall street, on 1st November next at 12 o'clock, noon. And the said party of the first part on receiving such payments at the times and in the manner above mentioned, shall at her own proper costs and expense execute and deliver to the said party of the second part, or to his assigns, a proper deed for the conveying and assuring to him or them the fee-simple of the said premises, free from all incumbrance; which deed shall contain a general warranty and the usual covenants. And it is understood that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators and assigns of the respective parties.

In witness whereof the parties to these presents have

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hereunto set their hands and seals the day and year first
above written.

ELIZABETH M. CONKLING, [L. S.]

THOMAS PRUDEN. [L. S.]

Sealed and delivered in presence of

Lizzie H. Zerega."

This contract was assigned by the said Thomas Pruden,
to the defendant J. Romaine Brown, by an assignment in
the words following, to wit:

"Know all men by these presents that I, Thomas Pruden,
for and in consideration of one dollar to me in hand paid,
the receipt of which is hereby acknowledged, I hereby
assign and set over to J. Romaine Brown, all my right,
title and interest in the within contract.

Dated New York, September 8, 1869.

THOMAS PRUDEN. [L. S.]

Witness, J. H. Morris."

When the time came for performing this contract, the
defendant, J. Romaine Brown, refused to complete, under
the advice of his counsel, Messrs. Wetmore & Bowne, on
the ground that the title to said premises was defective.
The defendant therefore, and the plaintiff, have agreed to
submit the question of title to the general term of the
Supreme Court; and if they hold the title to be good and
valid, that they give judgment that the said plaintiff ex-
ecute and deliver the said deed mentioned in said con-
tract, subject however to all taxes and assessments which
shall have been confirmed as liens upon said premises,
after the first day of November, 1869; and that said de-
fendant shall pay for the premises according to the terms
of the contract; and also shall pay all taxes and assess-
ments confirmed as a lien on said premises, and one hun-
dred and fifty dollars as liquidated costs in this proceeding;
and if they find the title bad, that they give judgment that
all payments which have been made to the said plaintiff
under such contract, shall be refunded, with interest, to
the said defendant, and that said plaintiff shall pay all costs

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and expenses of this proceeding; the same, however, not to exceed the sum of two hundred dollars; and that the said contract shall end and determine and be altogether annulled, and the said parties wholly released therefrom.

The question to be decided by the court is, whether Mary Hill, the grantor of the plaintiff's testator, under our statutes of descent, on the death of her son, Augustus M. Winter, acquired a fee in the said premises, an estate for life, or some lesser estate.

On the 26th of October, 1848, Boltes Moore died intestate, and seised in fee of the premises in question, leaving no widow or descendants him surviving; but a sister, Margaret Cheesbrough, and a grand-nephew, Augustus M. Winter, the son of a deceased nephew, and a grandson of a deceased sister, his only heirs at law; Margaret Cheesbrough and Augustus M. Winter inherited the lands of Boltes Moore referred to, as tenants in common in fee, and afterwards made an amicable partition; the premises in question fell to the share of Augustus M. Winter, and a release of the same was made to him by Margaret Cheesbrough, dated May 15, 1849. Augustus M. Winter died November 22, 1849, seised in fee of his portion of the lands so released and so descended to him from Boltes Moore, intestate, unmarried and without descendants, and leaving no father, and leaving a mother named Mary Hill, who after the death of her first husband, the father of Augustus M. Winter, and during the lifetime of said Augustus M. Winter, had married a second husband named George Hill; and by her last husband had children, brothers and sisters of the half blood to the said Augustus M. Winter, but not of the blood of Boltes Moore, the ancestor of said Augustus M. Winter, and who were living at his death.

Q. 1. Did the inheritance in the lands in question come to the said Augustus M. Winter by descent from his ancestor?

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2. To whom did the lands of the said Augustus M. Winter descend on his death, intestate and without descendants, and leaving no father, and leaving his mother surviving, and brothers and sisters of the half blood to him, but not of the blood of his ancestor? (a)

(a) The same facts that appear in the case agreed upon having been submitted to the Hon. William Inglis and Charles O'Connor, Esq., the following is their opinion as to the questions of law:

In relation to the case of Augustus M. Winter's half brothers and sisters, it is to be observed that by the common law, the half blood was entirely excluded from the inheritance, and rather than it should take, the lands were subject to escheat; this principle was subsequently modified, and the half blood was, in certain cases, permitted to inherit. The rule applicable to this subject, reenacted from an older statute, is to be found in 1 R. S. 753, § 15, *ch. 2, title 5*. By that statute it is provided that relations of the half blood shall inherit equally with those of the whole blood, in the same degree, and the descendants of such relations shall inherit in the same manner as the whole blood, unless the inheritance came to the intestate by descent, devise or gift of some one of his ancestors, in which case all those who were not of the blood of such ancestor, shall be excluded from such inheritance.

Under this statute the first question in the particular case is, how did the inheritance come to the intestate Augustus M. Winter?

It is conceded that it came to him by descent from Boltes Moore. Is Boltes Moore Augustus M. Winter's ancestor, within the meaning of the statute? The word ancestor, as used in this part of our statute of descents does not merely refer to the person from whom natural descent was claimed in a direct line; it also includes a person from whom property comes, though he be a collateral relative. The proper meaning of the word ancestor—ante cessor, being one who has preceded in the inheritance. In this case then, Boltes Moore is the ancestor spoken of by the statute, from whom the inheritance came to Augustus M. Winter, by descent. It is evident that Augustus M. Winter's half brothers and sisters are not of the blood of Boltes Moore. The statute therefore quoted above, by its express terms, excludes them from the inheritance.

It makes no difference as to the exclusion, as it has been suggested that it might, whether the lands that descended from Boltes Moore to Augustus M. Winter, came to Boltes Moore from a common ancestor, or whether Boltes Moore purchased them himself. The meaning and policy of the statute equally apply to all lands which the ancestor owned, in what way soever the title came to him. The statute does not make any inquiry how the ancestor acquired the land; it seeks only to exclude from the inheritance those not of his blood; this view of the 15th section is also taken by Chancellor Kent. (*See note to 4 Kent's Com. 404.*) The policy of preserving an ancestral inheritance in cases

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Thomas H. Barowsky, for the plaintiff.

I. The premises in question came to Augustus M. Winter by descent, from Boltes Moore, he having died intestate, unmarried and without issue, leaving a sister, Margaret Cheesbrough, and a grand-nephew, Augustus M. Winter, who was the grandson of a deceased sister, his only heirs at law. By the provisions of our Revised

of intestacy, in the blood of the ancestor from whom it came, is also found in other cases in the statute of descent, sections 11 and 12.

The course of descent is not changed by the fact that there was a partition of the estate descended from Boltes Moore to Margaret Cheesbrough and Augustus M. Winter, as tenants in common, by Margaret Cheesbrough and Augustus M. Winter having mutually released to each other, and holding particular portions afterwards in severalty. The title of each of them is still by descent from Boltes Moore.

It would appear, therefore, that the half brothers and sisters of Augustus M. Winter are excluded from the inheritance, in this case. The question then remains as to the right of the mother of Augustus M. Winter.

In our statutes of descent two provisions have been introduced which were unknown to the common law, which permit the father and mother to inherit in certain cases. (§§ 5, 6.) The 5th section directs that in case the intestate dies without lawful descendants, and leaving a father, then the inheritance shall go to such father, unless the inheritance came to the intestate on the part of his mother, and such mother be living; but if such mother be dead, the inheritance descending on her part shall go to the father for life, and the reversion to the brothers and sisters of the intestate and their descendants, according to the law of inheritance by collateral relations hereinafter provided; if there be no such brothers or sisters or their descendants living, such inheritance shall descend to the father in fee. The father is entitled to take, under this provision, an inheritance from his child, even where it had come from an ancestor of whose blood the father had none, and when even, if the father were dead, the half blood brothers and sisters of the intestate on the part of such father would be excluded under the 15th section.

The exclusion of the half blood under the 15th section of the Statutes does not apply to a father or mother, for they cannot properly be designated as being relatives of the half blood to their children. By this provision of the statute, the father of Augustus M. Winter, if living, would be entitled to take the inheritance in fee, (it not having descended from the intestate's mother to the exclusion of Augustus M. Winter's brothers and sisters, whether of the whole or the half blood.)

By the 6th section of the statutes of descents, the rights of descent to the mother of the intestate is somewhat different; where there are no descendants

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Statutes, Margaret Cheesbrough and Augustus M. Winter inherited each an equal share of his estate. (3 *R. S.* 41, §§ 7, 8, 5th ed.)

II. Augustus M. Winter and Margaret Cheesbrough inherited the estate of their ancestor, Boltes Moore, in fee and as tenants in common. (3 *R. S.* 42, § 17. 5 *id.* 10, § 2.)

III. The course of descent is not changed by the fact

and the father is dead, or not entitled to take, the mother takes a life estate, and the inheritance goes to the brothers and sisters; the statute then adds, if the intestate in such case shall leave no brother or sister, nor any descendants of any brother or sister, the inheritance shall descend to the mother in fee.

There is a slight difference in phraseology between the 5th and 6th sections of the statute. When the inheritance comes on the side of the intestate's mother, the 5th section gives the inheritance to the father for life, and the reversion to the brothers and sisters, according to the law of inheritance by collateral relations, hereinafter provided. The 5th section then provides that if there be no such brother or sister or their descendants living, it shall descend to the father in fee. The statute supposes that the intestate might have brothers and sisters living, but not such as might inherit.

In the 6th section the word "such" is omitted in speaking of the case of brothers and sisters, and it may be asserted that if the intestate leaves any brothers or sisters, even if not entitled to inherit, the mother cannot take the fee; because the literal prerequisite to her inheriting, expressed in the statutes, is not complied with, there being brothers and sisters.

The construction, however, of the 6th section, would probably be considered too strictly verbal, as against the mother of the intestate, and the omission of the word "such," as contained in the 5th section of the statute, relating to the intestate's father, would probably be considered a mere accidental variation of the language. This view is strengthened by the consideration that the 5th section of the statute, providing for the case of the father, was introduced into the law of descents on the suggestion of the revisors, whereas the 6th section, providing for the case of the mother, was inserted by the legislature after the revision was submitted to it. (*See Revisors' Notes*, 3 *R. S.* 603.) The section, therefore, being penned by different authors, might easily vary in phraseology, even where a similar object was in view. The legislature intended, by introducing the new canon of descent in favor of the mother, to give her the same privileges, in most respects, in the succession to her children's property, as the revisors had provided for the father. The sections appear to be for the most part counterparts of each other, and it is hardly to be supposed that the legislature intended to exclude the mother from inheritance, because there were brothers and sisters of the half blood who could not, in the particular case, where just before a rule had been laid down as respects the father. The word

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that there was an amicable partition of the estate descended from Boltes Moore to Augustus M. Winter and Margaret Cheesbrough, as tenants in common, by Margaret Cheesbrough and Augustus M. Winter mutually releasing and assuring to each other by deed the several estates which they afterwards held in severalty. The title to each of them is still by descent from Boltes Moore, their ancestor, they having acquired the estate by right of representation as his heirs at law, and not by any act or agreement of their own. (2 *Black. Com.* 160, § 200, and 193, § 241. 4 *Kent's Com.* 371. *Wood v. Fleet*, 36 *N. Y. Rep.* 499.)

IV. The manner in which the estate held by Margaret Cheesbrough and Augustus M. Winter, as tenants in common, was severed, by Margaret Cheesbrough and Augustus M. Winter releasing and assuring to each other by deed their respective shares, was a customary and lawful mode of making partition, especially where the parties are few in number and can make an amicable partition, as they did in their case, without application to the court, as prescribed by our Revised Statutes. (3 *Black. Com.* 157, § 324, p. 259. 3 *Cruise's Dig.* 142, §§ 8, 9, 10. *Willard on Real Estate*, 185, 435. 4 *Kent's Com.* 363. *Morris v. Ward*, 36 *N. Y. Rep.* 587.)

V. In the construction of the deeds of partition, executed by Margaret Cheesbrough and Augustus M. Winter, "it shall be the duty of the court to carry into effect the in-

brother or sister, in the last sentence of the sixth section of the statute, is therefore to be considered, not as referring to any persons of that degree, whether of the whole or of the half blood, but refer only to those who are capable of inheriting under the statute; the brothers and sisters of the half blood being in this case excluded from the inheritance, are not considered by the 6th section of the statute, and it would seem that the mother would take the lands in question in fee.

WM. INGLIS.

April 17th, 1850.

I have carefully considered the question presented by the above case, and am decidedly of opinion that the mother takes the land in fee.

New York, April 17th, 1850.

CH. O'CONOR.

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tent of the parties, so far as such intent can be collected from the whole instrument, and is consistent with the rules of law." (3 *R. S.* 38, § 2, 5th ed.)

VI. "The intent, when apparent and not repugnant to any rule of law, will control technical terms, for the intent and not the words is the essence of every agreement." (*Jackson v. Blodget*, 16 *John.* 172. *Same v. Myers*, 3 *id.* 395. *Same v. Beach*, 1 *John. Cas.* 102.) In *French v. Carhart*, (1 *Comst.* 152,) Jewett, Ch. J., says: "Where the language of a deed will bear more than one interpretation, looking only to the instrument, the court will look to the surrounding circumstances existing when the contract was made, such as the situation of the parties and the subject matter of the contract."

VII. The agreement to divide the estate held by Margaret Cheesbrough and Augustus M. Winter, as tenants in common, and their subsequently releasing and assuring to each other their respective shares according to the agreement—the two instruments executed by them, and relating to the partition and division of the estate—may be considered as parts of one assurance. (*Jackson v. Dunsbagh*, 1 *John. Cas.* 91. *Stow v. Tifft*, 15 *John.* 458.)

VIII. The half brothers and sisters of Augustus M. Winter are excluded from the inheritance, they not being of the blood of Boltes Moore, the ancestor of Augustus M. Winter. (3 *R. S.* 42, §§ 6, 15. *Kent's Com.* 404, *n. a and b*, 5th ed. *Black. Com.*, book 2, §§ 220–224; §§ 227–229, 235, 236.) If the intestate shall die without descendants and leaving no father, or leaving a father not entitled to take the inheritance under the last preceding section, and leaving a mother and a brother or sister, or the descendant of a brother or sister, then the inheritance shall descend to the mother during her life, and the reversion to such brothers and sisters of the intestate as may be living, and the descendants of such as may be dead, according

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to the same law of inheritance hereinafter provided. If the intestate in such case shall leave no brother or sister, nor any descendants of any brother or sister, the inheritance shall descend to the mother in fee. (3 R. S. 41, § 6, 5th ed.) Relatives of the half blood shall inherit equally with those of the whole blood in the same degree; and the descendants of such relatives shall inherit in the same manner as the descendants of the whole blood, unless the inheritance came to the intestate by descent, devise, or gift of some one of his ancestors; in which case all those who are not of the blood of such ancestor shall be excluded from such inheritance. (3 R. S. 42, § 15, 5th ed.)

IX. Augustus M. Winter having died intestate, unmarried, and without descendants, leaving no father, and leaving brothers and sisters of the half blood, but not of the blood of Boltes Moore, and who were, by the 15th section of the Revised Statutes, excluded from the inheritance, upon the death of Augustus M. Winter, the premises in question descended to Mary Hill, his mother, in fee. (3 R. S. 41, 42, §§ 6; 15.)

X. As to the general rules which are applied to the interpretation of statutes. (See 1 Kent's Com. 461, 468, 5th ed.; *Matter of Brown*, 21 Wend. 316; *Yates' Case*, 4 John. 359.)

XI. The court should, on the case agreed upon, render judgment for the plaintiff.

Wetmore & Bowne, for the defendant.

I. Augustus M. Winter acquired one half of these lands, not by descent, but by purchase. 1. By agreement between Mrs. Cheesbrough and Mr. Winter these lands, which descended to them, as tenants in common, from Boltes Moore, were divided. He released certain of the lands to her, and she released these lands to him. This may be called partition, release, or agreement; it required and was consummated by bargain; it was a purchase. Descent is

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defined to be, that estate which a man takes from his ancestor by single operation of law; purchase, that which a man hath by his own act or agreement. (2 *Black. Com.* 241.) 2. Title acquired by purchase gives to the owner a new inheritable quality, and is descendible to his blood in general, and not to the blood only of some particular ancestor. (2 *Black. Com.* 243. *Valentine v. Wetherell*, 31 *Barb.* 655. *Beebee v. Griffing*, 14 *N. Y. Rep.* 235.) 3. It follows, that as respects the one equal half part of the lands of which Augustus M. Winter died seised, it descended to his mother for life, and the reversion to his brothers and sisters in fee. (*Cases above cited.*)

II. The mother of Augustus M. Winter took a life estate only in the lands descended from him. Our statutes of descent, among other provisions, provide that where the intestate shall die without descendants, and leaving no father, or father not capable of inheriting, and leaving a mother and brothers and sisters, the inheritance shall go to the mother for life, and the reversion to the brothers and sisters; but if the intestate shall leave no brother or sister, then the inheritance shall descend to the mother in fee. (1 *R. S.* 752, § 6.) Relatives of the half blood shall inherit equally with those of the whole blood, unless the intestate came to the estate by descent, or gift from some one of his ancestors, in which case all those who are not of the blood of the ancestor shall be excluded from the inheritance. (1 *R. S.* 753, § 15.) In cases not provided for, the inheritance shall descend according to the course of the common law. (1 *R. S.* § 16.) At common law neither the mother nor brothers of the half blood could inherit. It is only by force of the statute that the mother inherits, and this statute has failed to provide for this case. Augustus M. Winter left, beside his mother, brothers and sisters; his mother took by statute a life estate and no more; to give her a fee, we must interpolate and add words to the statute, which the legislature have

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done in case of a father not capable of inheriting, but wholly omitted in the case of brothers and sisters. To give the mother a fee, the sentence should read, "if the intestate shall leave no brother or sister, *or brother or sister incapable inheriting*, then the inheritance shall descend to the mother in fee." But the legislature have not said so, and the inability of the mother to inherit, which existed at common law, has not been removed by the statute.

We must seek elsewhere for the heirs at law of Augustus M. Winter, upon whom these lands descend in fee.

III. Judgment should be rendered in favor of the defendant, according to the agreement.

By the Court, CARDOZO, J. The lot in question is part of land which descended from Boltes Moore to Augustus M. Winter and Margaret Cheesbrough, who thus became tenants in common. Being such tenants in common, each was seised solely or severally of his undivided share of the land, and all there was of unity between them was possession, not estate, in the land, (4 *Kent. Com.* 368,) and that possession they could sever and divide, and assign to each his separate part by parol; and the releases which they executed effected nothing more. Neither acquired any new estate. (*Wood v. Fleet*, 36 *N. Y. Rep.* 499.) Upon the death, therefore, of Augustus M. Winter, intestate, unmarried, without descendants, leaving no father, the fee descended to his mother, Mrs. Mary Hill, and to the exclusion of the brothers and sisters of the half blood, of Mr. Winter, they not being of the blood of Mr. Moore, the ancestor of Mr. Winter. (1 *R. S., Edm. ed.*, p. 702, *et seq.* *Morris v. Ward*, 36 *N. Y. Rep.* 587.)

There must be judgment for the plaintiff, on the submission.

[FIRST DEPARTMENT GENERAL TERM, June 6, 1870. *Ingraham, P. J.*, and *Cardozo* and *Geo. G. Barnard*, Justices.]

GARNAR vs. BIRD and others, executors, &c.

A bond will not be reformed, by striking out portions alleged to be erroneous, where there is no evidence to show it was not drawn in exact conformity to the agreement previously made between the parties, but on the contrary, the complaint alleges that the bond was drawn according to such agreement, and it is clear that both obligor and obligee understood that the bond should contain the provisions sought to be stricken out.

The fact that the obligor employed a lawyer, who gave him bad advice, and thereby deceived him as to his rights and induced him to execute the bond, furnishes no authority to the court to alter the contract of the parties.

The authority which a court of equity has, to reform a written instrument, does not extend to any alteration of a contract, but only to making the contract in which a mistake has occurred, correct, by conforming it to what was actually agreed upon between them.

Courts do not relieve from acts done under a false impression as to the facts, though under a mistake of the law. The parties must be left to other remedies founded on fraud, if it existed; or, if relief can be granted in any case for mistake of the law, founded on the fact that the adverse party had parted with nothing of any real value.

To a suit brought for the partition of a lot, several persons who owned the rear part thereof were all made parties. In the decree in that suit the description of the property ordered to be sold did not include the rear of the lot. All the parties having any title to the lot gave releases, except F. On the sale the whole lot was sold, and F. was paid, and gave a receipt for, her share of the proceeds, but executed no release. She, knowing of the sale, made no objection thereto. *Held* that her acts, in not objecting to the sale, and afterwards receiving payment for her share, *estopped* her, and her representatives, from claiming any interest in the land; and that the sale of the lot under the decree in the partition suit, was to be considered as conveying a good title to the whole lot, although it was not correctly described in such decree.

Although a mistake as to the law forms no ground for reforming a contract, yet where a party acting under a mistake of law or of fact, does acts which mislead the adverse party, he is estopped, as well as if he was not acting under such mistake.

THIS action was brought upon a bond given in part payment for a lot of ground sold by the plaintiff to William E. Bird, the testator of the defendants. The counsel for the testator, on examining the title, was of the opinion that it was defective, and so advised his client. This bond was given with a recital stating that it was

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necessary to procure certain releases, which could not then be obtained, but that the plaintiff should cause the same to be procured. And the condition of the bond was for the payment of the same upon and after the perfecting of the title, within ten years thereafter; and there was added a condition that the obligor would pay the interest thereon annually, and that the bond should be void if the title should not be perfected in ten years. This was in December, 1856. The releases were not procured, but this action was commenced in February, 1867. The complaint contained allegations that the plaintiff was misled and deceived by the representations of the testator and of his counsel, and that believing the same to be true he agreed with the testator to give the bond, in the form in which it was executed. It further alleges that the title to the premises sold was not defective, but was good, and that the conveyance from the plaintiff vested in the grantee a perfect and absolute title to the premises.

The plaintiff prayed for a reformation of the bond by striking out the recitals therein, and such part of the condition as did not provide for the payment of the principal sum within ten years; and he also prayed for judgment for the amount due.

Upon the trial of the cause, judgment was rendered decreeing that the bond should be reformed as prayed for, and giving the plaintiff judgment for the amount secured by the bond, with interest from the last payment, amounting in the whole to the sum of \$569.40, besides costs.

From that judgment the defendants appealed.

Joseph S. Ridgway, for the appellants.

I. The plaintiff has no right of action, and cannot recover upon the bond in suit, the plaintiff not having complied with or performed the terms and conditions expressed and stipulated therein, and mutually agreed upon at the

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time, by and between the parties thereto, and upon the performance of which by the plaintiff the sum stipulated was to become payable.

II. The plaintiff is not on any principle of equity entitled to the relief he seeks, or to any relief. 1. There was no mistake or misrepresentation of fact, and the plaintiff should not be permitted to avoid his contract. (a.) There is no proof that at the time the contract in the bond was entered into the plaintiff was mistaken concerning any matter of fact, or that any false or erroneous statements or representations were made by the defendant or by any other person to the plaintiff concerning any matter of fact. The plaintiff testifies that the attorney (who drew the deed for him and examined the title for the purchaser) said the title was imperfect. This was a conclusion and matter of law, and even if erroneous, it was an error of opinion, a mistake of law, and not a misrepresentation of fact. It was stated, not as a fact, but as an opinion, and the "grounds" for such opinion were stated by said attorney. The plaintiff testifies: "Said attorney stated the grounds, and told the plaintiff there was a defect in regulating the business of Mrs. Turner, that is to say in the partition proceedings." The plaintiff does not say or pretend that any matters of fact were untruly stated; on the contrary, he testifies "he could not say the objections so made were not founded in fact." (b.) The plaintiff is chargeable with notice of the contents of all deeds and other papers and proceedings under or through which he claims title. And he does not say, and there is no proof, that he did not have actual notice and knowledge of all the facts, on which such opinion, that said title was imperfect, was founded. (c.) The plaintiff, after the lapse of the ten years, reached, with or without the aid of counsel, the conclusion that the receipt by the heirs of the proceeds of the sale of the parcel of land not described in the partition proceedings, amounted to an implied ratifi-

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cation of such sale of said parcel. Whether it did or did not amount to a ratification, is a conclusion from the facts, and a matter of law. The plaintiff does not say he did not know or have information of the fact of such receipt, and of all the facts, at the time he entered into the contract. The presumption is that he did know, as he was bound to know, and there is no proof that he did not have actual notice and knowledge of all the facts. 2. To permit the bond to be reformed would in effect vary the terms and character of the contract entered into by and between the parties thereto, and after the defendants had in good faith fully performed the contract on their part, make for the defendants, and without their consent and without consideration, an entirely new contract, and one which neither of the parties thereto ever made or entered into or assented to, or intended at the time to make or enter into or assent to, and would be unjust to the defendants, and inequitable. (a.) The defendant's testator entered into the contract with the same knowledge and information the plaintiff had of the facts, and the like belief in the opinion expressed, that said title was imperfect, and in entire good faith. And there was and is no fact concerning which either party was mistaken, or any misrepresentation made. (b.) The existence of such belief that a title is imperfect, whether it be well or ill founded, tends to affect injuriously the holder's estate in the land, and the value thereof, and to operate as a bar to the full use and quiet enjoyment thereof by him, and to deter him from making improvements, and to induce an abatement from price in case of sale. (c.) The plaintiff could not, even if proof was admissible, nor will this court undertake to determine the extent to which the testator's estate in the land was so injuriously affected by such belief, or measure the amount of the actual damage suffered by the defendant's testator and his devisees, by reason of the operation of said causes; or say how far such causes ope-

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rated to prevent the improvement or sale of said land by the testator in his lifetime; or to what abatement in the price and value of said land his devisees submitted; or that said devisees did not, upon the sale thereof by them, in fact abate and lose \$500 of such price and value, because of such defect or supposed defect of title. The amount was, by mutual agreement between the parties at the time, fixed and liquidated at \$500. (d.) The contract in said bond is in effect a waiver and release by the testator and his devisees of any claim for any and all damages resulting from such defect, other or greater in amount than so liquidated and expressed. The covenants in said bond are mutual and binding on the plaintiff as well as on the defendants; and the plaintiff is, by his contract in said bond, in equity as well as in law, *estopped*, in like manner as the defendants, from showing the damages to be other or different in amount than the damages so liquidated and expressed in the bond.

III. But the appellants submit that the title was "imperfect," and contend that the opinion of counsel to that effect was correct, and that there was not even a *mistake of law*. (a.) The property sought to be partitioned is, in the complaint in the action and in the decree of partition and sale, described by metes and bounds. The parcel of land forming the rear portion of the lot in question is not mentioned or described in the complaint or decree or proceedings in the action. (b.) The master had no title to said land; and so far as that rear portion of the lot in question is concerned, he had no power or authority to sell or convey the same. The power and authority of a master could rightfully and with effect be exercised only as to the specific parcels described in said decree, and thereby partitioned and directed to be sold and conveyed. He had no power or authority to sell or convey other parcels of land not described in the complaint or decree, or thereby directed to be sold or conveyed. Under a mas-

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ter's deed of property not mentioned in the decree, or other proceedings in the action, and which he was not authorized or empowered to sell or convey, a purchaser would not acquire a *perfect* title. (c.) But the respondent will contend that the master paid, and the heirs received, the proceeds of the sale of the land sold, including the parcel in question not described in the decree, and thereupon argue that such receipt amounted to an *implied* ratification of such sale of said parcel. Several questions and objections are suggested which might have been raised at the time said contract was entered into. 1. The master was an officer of the court, and not an agent or attorney of the heirs. His authority was derived from the court, and his acts were not the subject of ratification by the heirs. If so, then wherever the equitable title, and whatever the equitable rights of the purchaser, the *legal* title remained in the heirs at law, as tenants in common, and did not pass. The defect would be properly remedied by an amendment of the decree and proceedings. 2. A mere ratification by parol, (even in express terms,) neither conveys nor gives a deed previously executed by a master, without any title or authority, the legal effect of a conveyance of an estate in fee in land. Nor does it amount to a release. At most, it forms but the ground or basis upon which a purchaser could in equity claim, and a court of equity could adjudge and decree that a release be executed. The purchaser was under no obligation to assume the risk and expense of possible litigation to obtain a release and clear the title. 3. The objection applies with still greater force where the alleged ratification is implied or inferential. The receipt by the heirs, for the proceeds, bears no evidence, nor is there any proof, that the heirs knew that the sum received included proceeds of any property other than that described in the complaint and decree. They had a right to presume that the same was

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the proceeds of property described in the complaint and decree and directed to be sold.

IV. The rule is well settled, that a mistake of the law is not a ground for reforming a deed or contract founded on such mistake. This rule is recognized as settled and is approved in the case of *Champlin v. Laytin*, (18 *Wend.* 407–425,) cited by the court at special term. In that case the court held that the respondent was entitled to relief upon the ground of mistake in matters of fact. It was upon that ground the chancellor placed his decision, and upon that ground his decision was affirmed. (*Id.* 419–425.) The reasoning by the court in that case in support of the principle upon which the rule is based is exhaustive and conclusive, and the language admits of no doubt that such is the rule, and gives no countenance to any departure from it. The current of authority is uniform, and to the same effect.

S. F. Cowdrey, for the respondent.

I. At the time of the execution of the bond by W. E. Bird, deceased, to the plaintiff, the plaintiff's title was good. 1. Richard Turner, at the time of his death, in 1835, was the owner of the whole of the premises in question. 2. The partition proceedings included all the heirs at law of the said Richard Turner, William Fogal and Charlotte E. his wife, the latter being one of such heirs, being complainants in the suit. 3. The description in the bill of complaint and decree of sale, although including only a part of the lot in question, was supposed by all the parties to the suit to include the whole thereof; and the proceedings throughout were conducted as if the whole of such lot was included. (a.) The master duly advertised "the lot and two story brick front house, * * * known as 351 Front street, being twenty-five feet front and rear, by seventy feet in depth," and posted and circulated hand-bills describing the same as above. The mas-

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ter also caused a survey of the premises in question to be made, and maps to be exhibited on the sale, representing the whole of the said lot. (b.) The master's report of distribution shows that the proceeds of sale included the proceeds of sale of No. 351 Front street, the lot in question, and that Charlotte E. Fogal received her full proportion and share of the whole proceeds. (c.) The said Charlotte E. Fogal was not only one of the moving parties in causing the sale of the lot in question, (being one of the plaintiffs,) but her attention was distinctly called to the statement by the master, showing the component parts of such proceeds. And the order for confirmation of the master's report of the distribution was entered by the attorney for Mrs. Fogal. (d.) There is no room for the slightest suspicion that Mrs. Fogal did not know she was receiving her full share of the proceeds of No. 351 Front street, the premises in question. 4. All the heirs at law of Richard Turner, deceased, executed the release to W. E. Bird, of their interest in the lot in question, at the time of conveyance by the plaintiff Bird in December, 1856, except two infant children of Mrs. Charlotte E. Fogal, who was then deceased. 5. The receipt by Mrs. Fogal of her distributive share of the proceeds of sale of the lot in question is an entire bar of her right, title and interest in the said lot. (*Martin v. Sherman*, 2 Sandf. Ch. 344. *In the matter of accounting of Nelson Place*, 7 N. Y. Leg. Ob. 217. *Overbach v. Heermance*, 1 Hopk. 340. *Requa v. Holmes*, 16 N. Y. Rep. 200.)

II. The recital in the bond now in suit, that "in order to perfect the title of said premises, it is necessary that all the children of Richard Turner, deceased, &c., should execute releases of said premises to said Bird," was untrue as a matter of fact.

III. The plaintiff was ignorant of the facts connected with his title. He was not only ignorant of those facts, but he was so ignorant of all his legal rights that he put

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on record the bond; he did not record the mortgage. If the mortgage had been recorded it would have been notice to purchasers from Bird, and he could not have sold the property without paying the mortgage.

IV. The plaintiff was misled by the misrepresentations of William E. Bird and his lawyer.

V. There is not the slightest room for inference that Bird's lawyer was the agent for the plaintiff. 1. The lawyer was examining the title for Bird, and in that connection alone the plaintiff requested him to draw his deed. 2. The plaintiff did not employ the lawyer of Bird for any other purpose, except simply to draw the deed.

VI. The title of the plaintiff being perfect at the time the bond was given, the taking of the bond was founded on a mistake of fact. (*Champlin v. Laytin*, 1 *Edw. Ch. R.* 471. *Same v. Same*, 6 *Paige*, 189. 18 *Wend.* 410.) But if held to be a mistake of law, the plaintiff is still entitled to relief. (*Kerr on Frauds*, 330.)

VII. The equities of the case are all in favor of the plaintiff. The plaintiff has acquired no beneficial interest by the bond. Mr. Bird has parted with nothing by accepting the plaintiff's deed; he has obtained a valid title to his lot, and he has not paid the purchase money. And the case is brought directly within the rule, where courts of equity will interfere to correct mistakes and reform legal instruments. (*Champlin v. Laytin*, *supra*. *Gillespie v. Moon*, 2 *John. Ch.* 596. *Stoughton v. Lynch*, *Id.* 222. 1 *Greenl. Ev.* 341. *Willard's Eq.* 59 to 76. *Kerr on Frauds*, 337, 340, 349.)

VIII. The condition of the bond does not require the obtaining of the release, as an arbitrary and independent fact, but only in connection with the assumed necessity of so obtaining them, for the purpose of perfecting the title. The recital in the bond states, as an assumed and admitted fact, "that in order to perfect the title," it is necessary that all the children of Richard Turner, &c., should exe-

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cute releases; that the amount of damage which the said Wm. E. Bird would suffer in case the title should never be perfected, has been estimated at \$500; that it has been agreed that the last named sum should remain in the hands of the said Bird until the plaintiff should cause said title to be perfected as aforesaid; or, in case said title should not be perfected within ten years, then the \$500 should become the property of Bird. And the condition then is, that Bird shall pay the \$500, upon and after the perfecting of the title. These recitals and conditions show, 1. That the *intention* of the parties was to perfect the title. 2. That the giving releases was the only mode (then supposed) of making the title perfect. 3. That a release was not required as a caprice, nor in pursuance of any imperative demand; that it was only required as a means to an end, not the end itself. That end was to perfect the title.

IX. The title being perfect when the bond was signed, the object and intention of the bond had no longer any force. The money was justly due, and should have been immediately paid. The ten years limited for payment having expired before suit was brought, the money is now actually due.

By the Court, INGRAHAM, P. J. So far as this judgment directs the reformation of the bond by striking out portions of it, it was erroneous. There was no evidence to show that the bond was not drawn in exact conformity to the agreement made between the parties, previously. On the contrary, the complaint alleges that the bond was drawn according to the agreement between the parties. It is clear that both obligor and obligee understood that the bond should contain the provisions which were ordered to be stricken out. The reason given for reforming the bond is that the plaintiff employed a lawyer, who gave him bad advice, and who thereby deceived him as to his rights, and thus induced him to execute the bond.

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Such a ground furnished no authority to alter the contract of the parties. The authority which a court of equity has to reform a written instrument does not extend to any alteration of a contract, but only to making the contract in which a mistake has been made, correct, by conforming it to what was actually agreed upon between them.

In *Leavitt v. Palmer*, (3 N. Y. Rep. 19,) Bronson, J., in referring to the rules as to reforming a deed, says: "If we could see that there had been a mistake in drawing up the deed, it could not be reformed without filing a bill for that purpose. But what is, if possible, more conclusive, there is not a particle of evidence to show that there was any mistake or accident in preparing the deed, or that it is not just what the parties intended it should be; and it could not be reformed, if a bill had been filed for that purpose. It is true the parties intended to secure the original liability of the bank, but so far as it appears, they intended to do it in the very way it was done, and that way is illegal. If they mistook the law, we cannot grant relief by making a new contract for them."

Such is precisely this case. The parties have made their contract just as they agreed to. They mistook the law, and they cannot be relieved by our making a new contract for them. Their rights respectively must be settled upon the contract as they made it, subject to such defenses as the law allows.

So in *Stoddard v. Hart*, (23 N. Y. Rep. 556,) it was held that where everything agreed upon was done, equity will not make a new contract. In *Kent v. Manchester*, (29 Barb. 595,) the rules applicable to such cases are stated to be that the mistake must be proved; that it must have been a mutual mistake; that the mistake must be of fact and not of law; and the real contract must be proved. Under these rules, this bond could not have been reformed as asked for.

Nor is the fact of bad advice being given to the plain-

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tiff, and followed by him, any ground for altering the provisions contained in that bond. Courts do not relieve from acts done under a false knowledge of the facts, though under a mistake of the law. (*Dupre v. Thompson*, 4 Barb. 279. *Gilbert v. Gilbert*, 9 id. 532. *Arthur v. Arthur*, 10 id. 9. *Nevius v. Dunlap*, 33 N. Y. Rep. 676.) The parties must be left to other remedies founded on fraud, if it existed; or, if relief can be granted in any case, for mistake of the law, founded on the fact that the adverse party had parted with nothing of any real value. (*Champ-
lin v. Laytin*, 6 Paige, 189.)

Independent of this question of reformation, there is another, upon which it is necessary to pass, in the decision of this appeal. That is, whether there was any defect in the title, such as the parties supposed to be the case, when the bond was prepared. It is conceded that the boundaries in the conveyance did not include the whole of the lot sold; nor did the decree of sale include any more than was covered by the deed. All the parties interested in the portion of the lot which was outside of the boundary were made parties to the partition proceedings. Under that decree the master sold the whole lot and gave a deed therefor, receiving the purchase money. This money was distributed among the parties. Charlotte E. Fogal, the ancestor of the two infant children, whose share is the only one not released, received her share of the proceeds of the estate, including the portion of the lot which belonged to her from another source. The question then arises, whether Mrs. Fogal, having received her share of the proceeds of this land, is not concluded thereby, and estopped from claiming to recover the property from the purchaser. If she was so estopped during her life, her children can have no estate since her death, in these premises.

It has been held that where two persons made partition between them of lands in which one party only had a life estate, and after the partition the interest in the fee de-

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scended to the one holding the life estate, who subsequently sold the part allotted in partition, such sale estopped the party selling from claiming any interest in the part allotted to the other. (*Baker v. Lorillard*, 4 N. Y. Rep. 257.) So a person having the legal title to land, who acquiesces in the sale by another, if he has encouraged the sale, is estopped from asserting, afterwards, his title against the purchaser. (*Storrs v. Barker*, 6 John. Ch. 166.)

In *Mount v. Morton*, (20 Barb. 123,) it was held that tenants in common who acted separately, claiming to own separate parcels of the tract, and conveyed such separate parcels, receiving pay therefor, were estopped from claiming as tenants in common, and that a previous partition would be presumed. Mitchell, J., says: "If the owners were misled as to the law, and supposed they owned the fee, they ought not the less to be estopped, as they by their acts led others to purchase, under the same belief, and they have each received nearly, if not quite, the same value as they would have received if they had sold the reversion in one fourth of each lot."

In *Rider et al. v. The Union India Rubber Co.*, (4 Bosw. 169,) it was held, in regard to personal property, that if a person permitted the same to be sold, and acquiesced in the payment therefor, and permitted the purchaser to take possession, he was estopped from afterwards claiming title to the property so sold.

In *Brewster v. Baker*, (16 Barb. 613,) one Thompson sold a boat belonging to him and others jointly. They knew of the sale, and made no objection, and gave no notice to the contrary, but received from Thompson a portion of the purchase money paid to him. They were held estopped from claiming, against the purchaser, to have any title thereto. The court say: "It is a well established principle that where the owner of property stands by and sees another sell it as his own to a *bona fide* purchaser, and

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makes no objection, and gives no notice of his rights, he will be held to have sanctioned the sale, and will not be permitted to assert his title, afterwards, as against such purchaser. And the same rule, I apprehend, prevails where the owner is informed of a sale of his property by another and does not object to it, or give the purchaser notice of his rights, but permits such purchaser to pay the purchase money as it becomes due to the vendor, and receives a portion of it from the vendor."

The principles deducible from these cases, applied to this case, are amply sufficient to enable us to decide the questions arising therein.

The bond in question was payable if the title was made perfect within ten years. The property for which the bond was given in part payment was a lot on Front street, the rear part of which belonged to several persons in common, who were all parties to a suit for the partition of the same. In the decree the description of the property ordered to be sold did not include the rear of the lot. All the parties having any title to the said lot gave releases, excepting Charlotte E. Fogal. On the sale in partition the whole lot was sold, and was purchased by a person through whom the plaintiff claimed title. Mrs. Fogal was paid, and receipted for, her share of the proceeds of the sale, but no release was obtained from her, before her death. She therefore knew of the sale, made no objection thereto, but received full payment for her share therein. I think there can be no doubt that her acts, in not objecting to the sale, and afterwards receiving payment for her share, estop her and her representatives from now claiming any interest in the said land, and that the sale of this lot under that particular proceeding is to be considered as conveying a good title to the whole lot, although not correctly described in the decree.

If Mrs. Fogal was thus estopped from making any claim,

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her children have no right or title to the premises, and there is no defect in the title to be remedied.

The title to the lot being perfect, the condition of the bond was fulfilled, and the plaintiff entitled to recover the amount due thereby.

Although a mistake as to the law forms no ground for reforming a contract, yet where a party acting under a mistake of law or of fact does acts which mislead the adverse party, he is estopped, as well as if he was not acting under such mistake. (*See Mount v. Morton, supra.*)

The judgment should be affirmed.

[FIRST DEPARTMENT, GENERAL TERM, June 6, 1870. *Ingraham*, P. J., and *Geo. G. Barnard*, Justice.]

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THE PEOPLE, *ex rel.* Sarah Ann Barbour, *vs.* BENJAMIN GATES.

The certificate of a justice of the peace as to the death of an infant's father, required by the statute relative to the binding of infants as apprentices (2 R. S. 154, §§ 1, 2,) to be given, before the consent of the mother shall be deemed sufficient, must be made by a justice of the town where the parties reside, and be indorsed upon the indenture itself.

Where a certificate was made, not by a justice of the peace of the town where the parties resided, but by a justice of an adjoining town, and instead of being indorsed upon the indenture itself, was indorsed on a separate paper annexed thereto; it was *held* that the statute had not been complied with, and that an indenture executed with the consent of the mother, only, had no binding efficacy, as against the infant.

Held, also, that, so far as the infant was concerned, there was no obligation on her part to fulfill the indenture; but that the mother could not take advantage of the defect in the execution thereof. That she, having consented to the binding of the child, and covenanted, by the indenture, that she would not entice the minor, or cause her to be enticed from the service of the persons to whom such minor was bound, during the continuance of the indenture, she was estopped from asserting a right to her custody herself.

The minor, under such circumstances, is under no obligation to remain with the person to whom she was attempted to be bound; nor has the latter any right

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to detain her in custody against her will. The minor, then, being without a lawful protector, the duty devolves upon the court, in the exercise of its equitable powers, to determine what disposition should be made of her custody.

In the performance of that duty, the interest of the child should be the controlling question; and whenever that is ascertained, judgment should be pronounced, irrespective of all other considerations.

This power is for the benefit of the child, and is not to be defeated by one having a mere legal title to its custody.

Where the mother of a child who is fatherless, is abundantly competent to provide for her, and there is no allegation of her unfitness, she is the proper person to have the custody of the child, instead of strangers.

In such a case the preferences of a child nine years of age will be entirely disregarded.

The statute relative to "apprentices and servants bound by indenture," is not merely directory, but is peremptory and absolute in its requirements, and must be substantially complied with, or the indenture will be void.

THIS was a proceeding upon *habeas corpus*, instituted by the relator, to obtain possession and custody of her infant daughter, Maria D. Barbour, who was nine years of age, and upwards.

On the 9th of May, 1866, the respondent, Benjamin Gates, and the infant, entered into indentures binding the infant to said Gates until she should attain the age of eighteen years. Gates covenanted, among other things, to teach said infant, or to cause her to be taught, the art and mystery of a seamstress, or such other occupation as was best suited to her capacity. Appended to the indenture was a certificate executed by the relator, consenting to the conditions of the indenture, on behalf of the minor. The instrument in question was attached to another indenture of the same character, executed by the relator and Gates and another minor child of the relator, and bearing date the same day. Upon the back of this last mentioned indenture was a certificate, dated on the 9th of May, 1866, signed by John M. Barnes, justice of the peace, to the effect that from evidence produced before him he was satisfied that the father of such infants was dead. It appeared that Barnes was not a justice of the peace of the

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town of New Lebanon, where Gates resided, and where the indenture was executed, but of the town of Canaan. No revenue stamp was attached to the indenture, at the time of its execution, but on the 9th of May, 1869, a stamp was attached to the certificate of the relator annexed to the indenture of her daughter, which was canceled by Gates as of the last mentioned date. Also another five cent stamp, which was not canceled at the same time, was attached at the top of the instrument in question.

J. C. Newkirk, for the relator.

R. E. Andrews, for the respondent.

MILLER, J. The most important question which arises upon this application is whether the indenture in question was executed in accordance with the provisions of the Revised Statutes, so as to make it binding and valid.

The statute (2 R. S. 154, § 1) provides for the binding of infants to serve as apprentices or servants, with the consent of the persons or officers named in section second. The latter section provides that such consent shall be given, 1st. "By the father of the infant. If he be dead, or be not in a legal capacity to give his consent; or if he shall have abandoned and neglected to provide for his family, and such fact shall be certified by a justice of the peace of the town, and indorsed on the indenture, then, 2d. By the mother."

It is insisted that the statute was not complied with, inasmuch as the certificate was not indorsed on the indenture itself, and was not made by a justice of the peace of the town of New Lebanon, where the indenture was executed. I think that the objection is well taken. The statute in question, which provides for the making of an indenture which is obligatory upon an infant, who cannot at common law, ordinarily, make any valid contract, must

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be considered as establishing a system by which they can lawfully bind themselves, and must therefore be substantially complied with. It is not merely directory, but is peremptory and absolute in its requirements. The father must consent, while living, unless he has not a legal capacity to give his consent, or he has abandoned and neglected to provide for his family; but if dead or thus incapacitated, then the mother must consent, upon a certificate of a justice of the town. The statute was not intended, as is contended, to require a certificate only in case of abandonment. Such a construction would be very narrow, and there is no satisfactory reason for thus limiting its provisions. Its manifest intention is, that when either of the facts named occurs, and "such fact" is certified as required, then the mother may consent. One of the cases enumerated is sufficient to authorize the consent of the mother, and when either of them happens, a certificate must be obtained as to that fact and nothing more.

The prior right being in the father, the statute was designed to require proof that he had no such authority, before the mother was permitted to exercise it; and to guard against fraud or imposition, the proof was to be made before a justice residing in the town where the indenture was executed.

It was intended, for the purpose of protecting the rights of all the parties, that the certificate of the justice should be indorsed on the indenture itself. This being required explicitly and positively, I am at a loss to see how the omission could be obviated. The indorsement upon another instrument does not conform either to the terms or the spirit of the statute, and is not a sufficient compliance with its provisions. It is plain to my mind that the statute has not been complied with, and that the indenture, therefore, has no binding efficacy, as against the minor.

A subsequent provision, under which the indenture in question was executed, of the same title, (2 R. S. 158,

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art. 3, § 26,) declares that "no indenture or contract for the service of any apprentice shall be valid *as against the person whose services may be claimed*, unless made in the manner before prescribed in this title."

The person whose services are claimed here is the infant, and so far as she is concerned, there is no obligation on her part to fulfill the indenture. The question then arises, whether the mother can take advantage of the defect? The question is not free from difficulty. She has consented to the binding of the child, and covenanted, by the indenture, that she will not entice the minor, or cause her to be enticed, from the services and government of the respondent, during the continuance of the indenture; and is she not thereby estopped from asserting any right to take away the minor from the custody of him to whom she has voluntarily thus confided it? It was her own free act, and unless the contract is void as to her, she cannot repudiate it. In the matter of *McDowles*, (8 John. 331,) which arose on *habeas corpus*, the indenture was not executed by the infant, according to the requirements of the statute, and it was held that the indenture, though the father was bound, was not binding on the infant; and that the infant alone could take advantage of any defect in the indenture, and if he did not choose to do so, he might waive the defect, and avail himself of the benefit of the apprenticeship.

In *Fowler v. Hollenbeck*, (9 Barb. 309,) which was an action of trespass on the case, for taking out of the possession of the plaintiff three infant children who were bound under indentures of apprenticeship, the indentures were held to be valid. And in discussing the question, it was said by Parker, J., that "he (the father of the apprentices, who was a party to the deed,) had conveyed to the plaintiff his right to the custody and services of the apprentices, and had covenanted not to take or entice them away. Independent of the statute, such a covenant was obligatory

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upon the father, at common law, and he cannot be protected in violating it." It was also held in that case that the statute (2 R. S. 209, § 1, 3d ed.) expressly authorizes the father to dispose, by deed, of the custody of his child during his minority, or for a less time. The question now discussed did not distinctly arise in that case, but the principle decided is one which seems to be upheld by numerous authorities. The relator, then, having parted with her right to the child, by the indenture in question, cannot assert a right to her custody.

The minor is under no obligation to remain where she is, nor has the respondent any right to detain her in custody against her will. She is, then, without a lawful protector; and the duty devolves upon this court, in the exercise of its equitable powers, to determine what disposition should be made of her custody. In the performance of this responsible duty the interest of the child should be the controlling question; and whenever this is ascertained, judgment should be pronounced, irrespective of all other considerations. (*The People v. Wilcox*, 22 Barb. 178. 14 N. Y. Rep. 575. *The People v. Cooper*, 8 How. Pr. 288. *The People v. Erbert*, 17 Abb. 395, and cases in notes, particularly the case of *McKain*, p. 399.) The authorities also hold that "this power is for the benefit of the child, and is not to be defeated by one having a mere legal title to the custody of the child." (See 17 Abb. 400.)

It is apparent, in this case, that the relator is abundantly competent to take care of, and to provide for, the minor; and in such a case there would seem to be no question that a mother, with all the affection that she must feel for her offspring, would be better adapted to the discharge of the duties of training her up properly than any strangers, however kind and careful they might be in providing for her. I entertain no doubt but that the child has been well taken care of by the person having her in charge, and I feel bound to say that I do not think the evi-

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dence in this case establishes that there are any matters connected with the society to which the respondent is attached, which renders it improper for her to remain there. With their religious faith this court has nothing to do. The constitution guarantees to every citizen liberty of conscience, and certainly the relator has no ground to complain on this score, when she has herself embraced the doctrines maintained by the society, become herself a member, and voluntarily parted with the custody and control of her infant children. But notwithstanding such is the case, there can be no question, as between the respondent and relator, that the interests of the child will be most substantially promoted and advanced by placing her under her mother's charge.

It is too clear to admit of an argument, that a mother who is the guardian of infant children by nature and nurture as well as by law, where the father is dead, is better calculated than any other person to train and protect them, during infancy, both in sickness and in health, and prepare them for future usefulness.

There are cases reported where the court, in the exercise of its authority, has left it to the infant to decide where he or she is willing to go. And I assume, for the purposes of this case, that this child would naturally cling to those with whom, of late years, she has been associated, and from whom she has experienced many acts of kindness and affection. Separated from her mother, as she has been, for a number of years, it is by no means remarkable that she should not realize any other mother than those who have watched over her, and who have performed, to some extent, at least, that important office. As was well said by a distinguished judge: "It seems to be but a mockery to ask a child of nine years of age whether it should remain with a person who brought it up, or go with a stranger." The feeling of attachment to those with whom she has most recently been intimately

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connected must, however, in time, yield to that affection, regard and love which none but a mother can feel and manifest towards her offspring.

In *The People v. Wilcox*, (22 Barb. 178, and 14 N. Y. Rep. 575,) the court held that, the father being dead, the mother was the proper person to be entrusted with the nurture, care and custody of an infant child, eight years of age. The child, in that case, had been brought up from earliest infancy by the grand-parents, and the grandfather had been duly appointed its guardian, and was abundantly able to provide for it. The child expressed a strong preference for the grand-parents, and considered her mother, from whom she had long been separated, as a stranger. The court held the mother to be the proper custodian, and directed that she be delivered to her. The case is nearly parallel with the present one, except that in the case cited, the grandfather had a clear legal title to the custody of the infant, and it had been taken, when a few weeks old, and placed under the care and charge of the grand-parents. The preferences of the child were entirely disregarded. Justice Mason, now one of the judges of the Court of Appeals, before whom the case last cited was heard, after a full discussion of the subject, and announcing his conclusion that the interest of the child would be best promoted by committing its custody to the mother, quotes from the opinion of the chancellor in *The People v. Mercein*, (8 Paige, 47,) as follows: "She, (the mother,) all other things being equal, is the most proper person to be entrusted with such a charge. The laws of nature have given her an attachment for her infant offspring which no relative will be likely to possess in an equal degree; and where no sufficient reason exists for depriving her of the care and nurture of her child, it would not be a proper exercise of discretion in any court to violate the law of nature in this respect."

Whatever difficulties may exist with this child in

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changing her residence, I entertain no doubt they will yield to the solicitude and care of the relator, who has evinced so much anxiety to assume the responsibilities which must be incurred in promoting the future welfare and happiness of her only child.

I have not deemed it important to discuss the other questions presented; but with the views I entertain I consider it my duty to commit the custody of this child to the mother.

As it may be desirable to review the decision of this case by appeal to the general term, I am inclined to grant a stay of proceedings, if an appeal be taken, upon terms to be fixed in the order to be entered herein; which may be settled upon notice. (a)

[COLUMBIA SPECIAL TERM, September 6, 1869. *Miller*, Justice.]

(a) Decision affirmed at the general term held at Albany, in March, 1870. HOGEBOM, INGALLS and PECKHAM, Justices.

COPLEY & HARLOW vs. O'NIEL.

Section 2 of the mechanics' lien law (*Laws of 1854, ch. 402*), gives a lien against the *owner*, to the extent of his interest, upon a house, and upon the land on which it stands, for labor done upon, and materials furnished for, such building, upon compliance with the provisions of that act.

Unless the person proceeded against is owner, there can be no lien; and if there is no lien there can be no judgment, under the act.

Thus, where the defendant, who was guardian of his infant daughter, erected a house upon land owned by her; *Held* that he could not, as such guardian, without authority from a competent court, build a house upon the land of his ward, and charge the expense upon the ward, or create a lien upon the property for labor and materials, in favor of the mechanics employed.

Although the statute authorizes a guardian to keep up and sustain the houses, grounds and other appurtenances to the lands of his ward, by and with the issues and profits thereof, or with any other moneys of the ward in his hands, this does not include the right of rebuilding.

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Permission to erect, on the ward's land, a building, with the right of removal, can only be obtained from the guardian; and such permission cannot be given by him as guardian, to himself as an individual.

A guardian having, as such, charge of his ward's land, his possession of it is in his capacity of guardian, and not otherwise. He cannot, by a contract with himself, create the relation of landlord and tenant, so as to render his occupation that of a tenant at will.

A PPEAL from a judgment entered upon the report of a referee, in a proceeding to foreclose a mechanics' lien.

In 1867 the defendant, Michael O'Neil, contracted with the plaintiffs, who were carpenters engaged in building houses and furnishing materials for building, to build for him a house on premises which he claimed to own, in the town of Pamela, Jefferson county, and to furnish lumber and other materials therefor. The defendant agreed to pay a part of the amount in cash, on the completion of the house, and to secure the balance by a mortgage upon the house and lot. The plaintiffs accordingly built a frame house for the defendant on the lot in question, furnishing the lumber and materials therefor; which house was completed on the 4th of May, 1868, and a notice of lien was filed May 14, 1868, the plaintiffs claiming and supposing that the defendant was the owner of the house and premises. The labor, lumber and materials used in building such house amounted, on that day, after deducting all set-offs, to \$254.25. The defendant, on being required to give a mortgage upon the house and lot to secure that amount, refused to do so. The legal title to the lot, at the time the notice of lien was filed, was in Margaret O'Neil, an infant daughter of the defendant, who had never paid any consideration therefor. At that time the defendant was occupying the house and lot, and his daughter Margaret was living with him and in his family. No express agreement for leasing or the payment of rent for the premises existed between the defendant and his daughter. There had previously been a small house upon

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the lot, which was burned down. The house built by the plaintiffs was put on stones and blocking—a temporary foundation without plastering or mason work—and so remained, at the time of the filing of the lien and commencement of these proceedings.

The cause was referred to a referee, who made a report adjudging and deciding as matter of law: 1st. That the defendant, on the 14th of May, 1868, was the owner of the house in question. 2d. That the plaintiffs, by filing their notice with the town clerk, &c., acquired a lien upon the said house. 3d. That the plaintiffs were entitled to judgment against the defendant, Michael O'Neil, for the sum of \$254.25, damages, with interest thereon from the 4th day of May, 1868, besides costs. Judgment being perfected, the defendant appealed.

B. Bagley, for the appellant.

Moore & McCartin, for the respondents.

By the Court, MULLIN, J. Section 2 of the mechanics' lien law (*Laws of 1854, ch. 402*), gives a lien against the owner, to the extent of his interest, upon a house and upon the land on which it stands, for labor done upon, and materials furnished for, such building, upon compliance with the provisions of said act.

Unless the person proceeded against is owner, there can be no lien, and if there is no lien there can be no judgment, under this act. The defendant and his wife had owned the land on which the house was erected. The wife died, and upon her death he became sole owner of the lot. Before the labor was performed, or the materials were furnished, by the plaintiffs, the defendant conveyed said land to his daughter Margaret, who was sole owner, at the time of the erection of the house, and had been, from April, 1867. The bargain for building the house

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was made in the fall of 1867. It is thus conclusively established that the defendant did not own the land on which the house stood, at the time of the commencement of the proceedings to acquire a lien. Was he, at that time, or at any time, owner of the house?

The daughter, who owned the land, was, and still is, a minor. The father was her guardian. She lived with him. The dwelling-house was burned, and he proceeded to erect another. As guardian, he could not, without the authority of a competent court, erect a house on the minor's land and charge the expense upon the ward. (*Hassard v. Rowe*, 11 Barb. 22.) In that case the plaintiff was guardian of the defendants, who inherited from their father two lots of land in the city of New York, the buildings on which had been destroyed by fire. The plaintiff, deeming it for the interest of his wards that new buildings should be erected on the lots, used the insurance money received upon an insurance of the old buildings, and adding to it moneys of his own, erected new buildings. He filed a bill to compel the repayment to him of the moneys so advanced by him. The bill was dismissed, on the ground that the plaintiff could not, without authority from the court, expend his money in improving the land of the ward, and be reimbursed out of the ward's estate. If the guardian could not charge the estate of his ward for advances made by himself, it would be difficult to comprehend how he could effect the object by employing another to make such advances.

By 2 *Statutes at Large*, page 150, section 20, a guardian is authorized to keep up and sustain the houses, grounds and other appurtenances to the lands of his ward, by and with the issues and profits thereof, or with any other moneys of his ward in his hands. Keeping and sustaining the houses &c. of the ward does not include rebuilding; if it did, the case of *Hassard v. Rowe* would have been decided the other way. The chancellor held, in *Putnam v.*

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Ritchie, (6 *Paige*, 390,) that a person who, under a misapprehension of his legal rights, had made large and valuable improvements on lands of minors, they (the minors) were entitled to the improvements, but were not bound to pay for them. And he further held that the minors were not chargeable with fraud or acquiescence, until they became acquainted with their legal rights. In the case cited the plaintiff had taken from the mother of the defendants a release of a lease in fee of the premises in question, of the rent of which the defendants' father died seised. She supposed the lease was assets, and that it was for the interest of the children to be released from the payment of the rent; and after the plaintiff obtained the release, he entered and made the improvements for which he sought compensation. The defendants had recovered the premises in an action of ejectment, and the bill was filed to restrain that suit until the defendants should pay him for his improvements. His bill was dismissed.

In the case before us, the plaintiffs are charged with notice of Margaret's title to the premises; at all events, they are chargeable with notice that the defendant had no title to them when the bargain for erecting the house was made, and they have no reason to complain if, with such knowledge, they did the work and furnished the materials sought to be charged as a lien on the house.

The defendant being guardian, and as such having charge of the ward's land, his possession of it was in his capacity of guardian, and he could be in possession in no other. He could not, by a contract with himself, create the relation of landlord and tenant, and hence his occupation could not be that of a tenant at will.

It is doubtless true that a guardian would be liable to account to his ward for the use of the ward's lands, if he occupied them for his own benefit. But such liability is not as tenant, but as a debtor; having omitted to let the prem-

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ises to others, he must account for what he ought to have received from them.

Permission to erect, on the ward's land, a building with the right of removal, could only be obtained from the guardian. This again made necessary a contract by the defendant with himself; so that the plaintiffs cannot claim even a license to erect and remove the building that is binding on the ward.

When the guardian erects a building, especially a dwelling, on the ward's land, it must be presumed to be a permanent annexation, because it may be attached to the soil; and this presumption is very much increased when the person erecting the building is the father of the ward. I am unable to discover any ground on which the defendant can be held to be the owner of the house, and not being owner, there can be no lien.

Whether, on the facts proved, the plaintiffs can, in equity, obtain a lien on the house, or house and land, is a question not before us, and upon which I express no opinion. If there is any such relief it is open to the plaintiffs, if the lien sought to be enforced in this proceeding fails.

It is suggested by the plaintiffs' counsel that the defendant's counsel has served no exceptions to the findings of the referee, and hence he cannot assail the findings either of fact or law. In this he appears to be mistaken. The case contains exceptions to both. The referee finds the facts as to ownership, precisely as they were proved by the defendant. He had, therefore, no ground for excepting to the facts. The exception to the conclusions of law is "to all the findings as matter of law." By the decision of the Court of Appeals, such an exception is too general, unless all the conclusions of law are erroneous. (*Magie v. Baker*, 14 N. Y. Rep. 435.) His conclusions are: *First*. That the defendant was owner. This is, in my opinion, clearly erroneous. The *second* is, that the plain-

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tiffs, by their notice, obtained a lien on the house. This is erroneous if the defendant was not the owner. The *third* is, that the plaintiffs were entitled to judgment for their debt and costs. This is also erroneous, as in this proceeding no judgment can be rendered for debt and costs, unless a lien has been obtained.

The exceptions to the conclusions of law, on their face, are sufficient, and they are before us for review.

The judgment should be reversed, with costs. As a new trial would be no benefit to the plaintiffs, none should be awarded.

[ONONDAGA GENERAL TERM, October 5, 1869. *Morgan, Bacon, Foster and Mullin*, Justices.]

CHARLES HOLMES vs. SARAH A. HOLMES.

A decree of divorce obtained in another State upon a personal service of process upon the defendant in this State, is valid and effectual, so far as the plaintiff is concerned.

DEMURRER to the defendant's answer. The action was for a divorce *a vinculo matrimonii*. By her answer the defendant set up three defenses; by the second of which she alleged that in 1865 the plaintiff, claiming to be a resident of the State of Iowa, instituted proceedings in that State to obtain a divorce from her on account of cruel and inhuman treatment of the plaintiff by the defendant, and that due notice of such proceedings, in accordance with the laws of Iowa, was personally served upon the defendant, she then being in the State of New York, but that she did not appear, to oppose such proceedings, but suffered a default to be taken; and that such proceedings were thereupon had, in a district court of said State of Iowa, that upon the pleadings and the proofs

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offered by the plaintiff, it was decreed "that the bonds of matrimony between said plaintiff and said defendant be totally dissolved, and that the plaintiff be restored to the same condition, as relates to the defendant, as though the marriage between the plaintiff and defendant had never taken place."

And it was by said answer further averred, that said decree, by the laws of Iowa, then and at all times since was, and is, legal, valid and effectual; and that thereby the marriage contract between the parties to this action was annulled, and the defendant was thereby restored to all the rights and privileges of an unmarried woman, including the right to marry again.

To this second defense the plaintiff demurred, upon the ground that it did not state facts sufficient to constitute a defense.

E. H. Prindle, for the plaintiff, cited *Borden v. Fitch*, 15 John. 121; *Vischer v. Vischer*, 12 Barb. 640; *McGiffert v. McGiffert*, 31 id. 69; *Bradshaw v. Heath*, 13 Wend. 407; *Todd v. Kerr*, 42 Barb. 317; *Munroe v. Douglas*, 4 Sandf. Ch. 126; 3 Am. Law Reg. N. S. 193 and cases cited; *D'Arcy v. Ketchum*, 11 How. U. S. 165; *Webster v. Reid*, Id. 456; 18 id. 404; 2 Bish. on Mar. and Div. 4th ed. §§ 157, 160, and cases cited; *Dunn v. Dunn*, 4 Paige, 425; *Price v. Hickok*, 39 Vt. Rep.; *Fenton v. Garlick*, 8 John. 193; *Kilburn v. Woodworth*, 5 id. 37.

H. R. Mygatt, for the defendant, cited *Coddington v. Coddington*, 10 Abb. Pr. Rep. 450; *Kinnier v. Kinnier*, 53 Barb. 454; 2 Bish. on Mar. and Div. 4th ed. 706, § 760; *Dezell v. Odell*, 3 Hill, 215.

BOARDMAN, J. To sustain this demurrer it is necessary to assert, as a legal principle, that both parties to the action must have resided within the State of Iowa when the decree

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in question was granted; that service of process, summons or notice upon a defendant outside of the limits of the State wherein the action is brought is null and void, and gives to the court no jurisdiction of the person of the defendant—no power to make the decree in question. I think such doctrines cannot be sustained. They would certainly invalidate many decrees in divorce cases, granted under the laws of this State, where service is made by publication, or by personal service without the limits of the State. It would render it impossible to obtain a divorce when the defendant had left the State at the same time the act giving a right of action was committed, as in case of adultery, accompanied by elopement. I do not understand that any cases go so far.

Nearly all of the cases cited by the plaintiff's counsel declare decrees void where no process was served upon, or notice given to, a defendant residing in another State, unless the defendant voluntarily appeared. The case of *Dunn v. Dunn*, (4 Paige, 425,) was one of irregularity, and the chancellor recognizes the statutory mode of proceeding to acquire jurisdiction. The irregularity was, however, fatal to the decree. Several of the cases relate to the effect of foreign decrees upon property in this State, and were held to be invalid as against the laws of this State touching the right to or disposition of property. (5 John. 37. 8 id. 194. 13 Wend. 407.) Not one of these cases holds that a decree is void when process or notice is served personally on the defendant outside of the jurisdiction of the court; but by implication, nearly all the cases hold that such service is sufficient. 2 Bish. on Mar. and Div. 4th ed. §.155, &c., lays down the rule as follows: "To entitle the court to take jurisdiction, it is sufficient for one of the parties to be domiciled in the country; both need not be; neither need the citation, when the domiciled party is plaintiff, be served personally on the defendant, if such service cannot be made." The author

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has maintained this proposition with great learning and cogency. Chancellor Kent, (2 *Kent's Com.* 11th ed. m. p. 110,) expresses the same opinion, "that divorces pronounced according to the laws of one jurisdiction * * ought to be recognized, in the absence of all fraud, as operative and binding everywhere, so far as relates to the dissolution of the marriage;" approving the decision in *Harding v. Alden*, (9 *Greenlf.* 140.) It is submitted that every State has the right to relieve its *bona fide* citizens from disabilities wrongfully endured, and to redress wrongs.

Whatever may be deemed the *status* of the defendant, in cases like this, it cannot be denied that the divorce is effectual, so far as the plaintiff is concerned. It would seem preposterous that he should attempt to invalidate a decree to which he is a party, which he has procured to be made, and upon the faith of which the defendant has acted. Of course every decree is liable to be impeached for fraud or collusion, or by showing a want of jurisdiction of the plaintiff, or of the subject matter. But these are considerations which cannot arise upon a demurrer.

Upon a careful review of this case, it would seem that the decree pleaded by the defendant was had upon due notice to the defendant, and that the divorce thereby granted was valid and effectual, under the laws of the State of Iowa, so far as appears upon such record; that being valid and binding upon the parties thereto, under the laws of the State where the same was rendered, it becomes *prima facie* evidence of the facts therein contained, in the courts of every other State.

The demurrer to the second defense or answer is therefore overruled, with the costs of the demurrer; with leave to the plaintiff to reply, if he shall be so advised, within twenty days after notice of this decision, upon payment of such costs.

[CHENANGO SPECIAL TERM, February 21, 1870. Boardman, Justice.]

RICHTER vs. POPPENHUSEN and VAN AUW, ex'rs &c., impleaded, &c.

To render the executors of a deceased partner liable as partners, with the surviving partner, in respect to the business carried on after the death of their testator, it is necessary to show that they voluntarily employed the testator's assets which had come to them, in the trade.

It is not sufficient that the business is carried on by the surviving partner with their assent and encouragement; it being his right and duty to do so without either.

Nor do executors incur any responsibility by allowing the share of the capital of their testator to remain in, and be employed in, the business of the partnership, after his death, for the benefit of the *cestuis que trust*, when it is done in accordance with the testator's instructions, contained in his will, or with the partnership agreement; but the assets so directed to be employed are liable to make good the debts contracted during their employment.

To this extent the estate of a deceased partner will, in equity, be applicable to the liquidation of the demands of those who have become creditors of the partnership after his decease.

But the executors cannot be made liable personally without entering into the partnership.

ON the 6th of October, 1865, John G. Perzel, as general partner, and Herman A. Schleicher, as special partner, formed a special partnership under the firm name of "John G. Perzel." They commenced business in the city of New York, and continued to transact the same there until the spring of 1866, when they removed their business to the county of Kings. Schleicher, the special partner, died on the 17th of July, 1866, leaving a will by which he appointed the defendants, Conrad Poppenhusen and A. J. Van Auw, Herman Funk and H. A. Cassabeer his executors. The will was duly proved, and the defendants Poppenhusen and Van Auw, having qualified as executors, commenced a suit against Perzel, the general partner of their deceased testator, to wind up the affairs of the firm, they refusing to continue it. On the 28th of November, the present plaintiff commenced an action in the Supreme Court against Perzel, and Poppenhusen and Van Auw as executors of Schleicher, by the service of a summons and

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complaint on Perzel alone, alleging that they sold and delivered to the defendants the property mentioned in the complaint, between the 20th of June and the 6th of October, 1866, nearly all of it before the defendants became executors. The defendant Perzel alone, appeared. On the 5th of January, 1867, the plaintiff entered judgment against the defendant Perzel, for \$562.76. On the 9th of December, 1867, the plaintiff, Richter, served on the defendants Poppenhusen and Van Auw a summons under section 375 of the Code, to show cause why they should not be bound by such judgment. They put in an answer denying each and every allegation in the complaint. The action was tried at the circuit on the 26th of January, 1869, before Justice GILBERT and a jury. At the close of the plaintiff's testimony the court, on the defendants' motion, dismissed the proceedings, and the plaintiff appealed.

Weeks & Forster, for the appellant.

Ira D. Warren, for the respondents.

By the Court, GILBERT, J. The issue tried was between the plaintiff and the defendants named as executors of Mr. Schleicher, deceased; and arose upon a denial of the allegation in the complaint that the plaintiffs sold and delivered coal to the defendants, at various dates between 20th June, 1866, and 1st of October, 1866, at an agreed price therein stated. The evidence showed a sale in fact of most of the coal to a partnership composed of the defendant Perzel and the deceased Mr. Schleicher, and a portion thereof to the surviving partner, after the death of the latter. It was sought, however, to make the executors of Mr. Schleicher liable on the ground that they had carried on the partnership business in connection with the surviving partner, after the death of their testator. The court below deemed the evidence insufficient to establish this fact, and dismissed the complaint. Upon a review

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of the evidence we are satisfied that this ruling was correct. The material facts are these: The partnership between Mr. Perzel and the testator was formed for the manufacture of woolen goods, and was to continue until October 2, 1870. The articles provided that, in case of the death of Mr. Schleicher, the capital contributed by him, being \$20,000, should remain for the benefit of his representatives, and the business should be continued until the expiration of the term. Mr. Schleicher died July 17, 1866. The defendants qualified as executors on the 17th of September, following. Mr. Perzel, the surviving partner, was called as a witness, by the plaintiff, and testified that the sign put out, on commencing business, was "Pioneer Woolen Mills;" that he continued the business up to October 5, 1866, and bought coal of the plaintiff and others, and whatever was required to carry on the establishment, after Mr. Schleicher's death.

The plaintiff testified that on the 16th or 17th of September, 1866, he went to see the executors, to know what he had to do about delivering coal at the factory; that Mr. Poppenhusen referred him to Mr. Van Auw; that he told Mr. Van Auw he had a contract with Mr. Schleicher to deliver coal for the Pioneer Woolen Mills; and asked him what he had to do as to the delivery of any more coal there, and that he had been advised not to deliver on Perzel's order. He further testified: "Mr. Van Auw told me, 'the business is going on just the same; we are going on with the business there just the same as before Mr. Schleicher's death;' he wanted me to go on and deliver coal, only to be very careful that I only delivered what was wanted; that I should be paid, but that he would not pay any thing before the estate was settled. After that, I went on and delivered coal; the amount so delivered was about one third of the coal sued for." Two other witnesses testified to sales of goods to the firm of John G. Perzel, after the death of Mr. Schleicher; and that after

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suits against the surviving partner and the executors were brought, the bills were paid by work at the mills. This was all the evidence connecting the executors with the business carried on after the death of Mr. Schleicher, and we are of opinion that it is insufficient to make them liable as partners. To create such a liability, it is necessary to show that they voluntarily employed the testator's assets which had come to them, in the trade.

It is not sufficient that the business is carried on by the surviving partner, with their assent and encouragement; for it was his right and duty to do so, without either. The surviving partner succeeded, primarily, to the rights and interests of the partnership. He had the entire control of the partnership property, and the sole right to collect the partnership dues. (*Voorhis v. Childs' Executor*, 17 N. Y. Rep. 356.) Nor do executors incur any responsibility by allowing the share of the capital of the testator to remain in, and be employed in, the business of the partnership, after his death, for the benefit of the *cestuis que trust*, when it is done in accordance with the testator's instructions, contained in his will, or with the partnership agreement; but the assets so directed to be employed are liable to make good the debts contracted during their employment.

To this extent the estate of a deceased partner will, in equity, be applicable to the liquidation of the demands of those who have become creditors of the partnership after his decease. (*Devaynes v. Noble*, 1 Mer. 616, 622. *Vulhamy v. Noble*, 3 id. 614. *Whightman v. Townroe*, 1 M. & S. 412. *Ex parte Garland*, 10 Vesey, 119. *Ex parte Holdsworth*, 1 M. D. & D. 475. *Thompson v. Andrews*, 18 K. 116. *Cutbush v. Cutbush*, 1 Beav. 184. *Thompson v. Brown*, 4 John. Ch. 627. *Story on Part.* § 70.)

The executors, however, cannot be made liable personally, without entering into the partnership. When this is done, then they become liable as partners, although they derive no profit personally, but are concerned only

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for the use and benefit of others; and this liability arises either by virtue of an actual agreement, or upon the familiar principle that they have held themselves out to the world as partners.

We have looked into the other exceptions, but find no error in the rulings of the court. The evidence rejected, however relevant to establish grounds of equitable relief, was wholly impertinent to the issue presented for trial.

The judgment should be affirmed, with costs.

[KINGS GENERAL TERM, February 14, 1870. *J. F. Barnard, Tappan and Gilbert*, Justices.]

CASSIDY vs. LE FEVRE and WHITTAL.

The plaintiff agreed to furnish to the defendants an engine, boilers, &c., to be of the best materials and subject to the approval of the defendants' engineer, and to guaranty that they should be in perfect running order. The engine, &c., were delivered, and notes given for the price, but on attempting to use the engine, one of the flues collapsed, so as to prevent any further use of it. The plaintiff, on being applied to by the defendants, promised to repair the flues, which he did, by putting in new ones, and the engine, as repaired, was, with the boilers, approved by the engineer, accepted by the defendants, and continued to be used by them. *Held* that the defendants not having notified the plaintiff of their determination not to accept the engine, on discovering the defect, but having permitted him to make alterations, and continued to use the engine, afterwards, this was to be deemed an acceptance of the same, and a waiver of any claim on account of the previous defect.

Accordingly *held* that for the delay caused by the substitution of new flues, the defendants were not entitled to recover damages.

APPEAL by the defendants from a judgment entered upon the report of a referee.

The action was brought to recover the amount of two promissory notes, and a balance of account. The claims were for the purchase price of a steam engine and boilers and other property sold the defendants for their factory, known as the Glenville Mills. The contract of sale was

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made by letter. The defendants set up in their answer a warranty and breach, and asked to recoup damages. The defect complained of was imperfection in one of the flues of one boiler, which, as the defendants alleged, collapsed in consequence. The damage sought to be recovered was loss of profits of the mill while a new flue was being put in. There was no attempt to prove the difference in value between such an article as the defendants alleged the plaintiff was to deliver and what he did deliver. The plaintiff's proof showed that the boilers and flues were such as the contract called for, and that he fully performed the agreement on his part. The referee before whom the action was tried found and reported the following facts:

That on or about the 23d day of February, 1866, the plaintiff undertook and promised to furnish, sell and deliver to the defendants a steam engine of certain dimensions and description, and certain machinery, appurtenances and furniture, together with two boilers of a certain size, with two return flues each, for the price or sum of \$5750, payable in notes of the defendants at four months from the time of delivery thereof. That the plaintiff so agreed to furnish the same in a reasonable time, and that they should be of the best materials, and should be subject to the approval of the engineer of the defendants, and he agreed to, and did, guaranty that they should be in perfect running order. That the plaintiff, on or about the 1st day of March, 1866, delivered to the defendants an engine and other things of the size and proportions called for by the contract, and also two boilers of the size and general proportions and character called for thereby, under and pursuant to said contract. That the plaintiff, on or about the 11th day of June, 1866, sold and delivered to the defendants certain other goods, wares and merchandise, of the value of \$106.19. That the defendants shortly thereafter made and delivered to the plaintiff their two several promissory notes, one for \$3000 and one for \$2500,

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being the same mentioned in the complaint herein, in payment on account of \$5750, the price of said original boilers, machinery and accompaniments. That there remained of the price of said engine and boilers, not embraced in said notes, the sum of \$250, and also for certain other goods sold and delivered to the defendants, the sum of \$106.19; making in all the sum of \$356.19 due the plaintiff on account, besides the amount embraced in said notes. That on or about the 25th day of April, in said year, the defendants attempted to use said engine, and while so attempting to use it, and while steam was in the boilers, one of the flues thereof collapsed by reason of the pressure of steam thereon. That by reason of the collapse of said flue, the said engine and boilers became incapable of being used, and remained so unfit for use for a long time, and until about the 13th of June in said year. That shortly after the time when said flue so collapsed, the defendants called on the plaintiff in respect thereto, and the plaintiff proceeded to repair the same, and also to take out the other flues from both boilers, and replace them with new ones, at the request of the defendants. That the repairs of said collapsed flue, and the alterations or replacing with new ones of the other flues, together, occupied until about the 13th day of June following the collapse. That during said time the defendants were deprived of the use of said engine and boilers, and also of another boiler intended for use in connection therewith. That by reason of the loss of the aid and services of said engine and boilers, occasioned by the collapse of said flue, the work of said mill was retarded, the amount of cloth manufactured for the time was less, and that manufactured was of less value than otherwise it would have been. That the engine and boilers, when delivered to the defendants, were of the best material in common use for such purposes, and were in perfect running order. That the engine delivered was approved by the engineer of the defendants about the time

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the same was received by them. That the boilers and flues first delivered were not approved by him, and were not passed upon by him at all. That a part of each of the flues in said boilers was made of iron not entirely new, but which had been in use elsewhere for about six months. That that fact, however, made very little, if any, difference in the quality or value of the article, and none at all in the strength of it at the time of the delivery of it to the defendants or at the time of the collapse. That the boilers, as they were after the repairs and alterations made by the plaintiff after the collapse, were approved by the engineer of the defendants, and were without fault. That the defendants paid for the board of the workmen of the plaintiff while repairing the flues of the boilers \$124, and for freight and cartage of things sent them by the plaintiff for his use \$29.50, making in all \$153.50.

And the referee found, as conclusions of law, that the plaintiff was not liable to the defendants for damages arising from the collapse of said flue, arising from the loss of the use of the engine and boilers and other machines, for the time. That the plaintiff was entitled to recover against the defendants the amount of said two notes, with interest on them, from the time they fell due, respectively, and also the sum due on account, being \$356.19, with interest on \$250, part thereof, from the 1st day of July, 1866, and on the remaining part thereof, \$106.19, from the 13th day of June, 1866, which, at the date of the report, amounted in the aggregate to \$6846.50. That the defendants, however, were entitled to recover, by way of counterclaim, the sum paid by them for board of the workmen for the plaintiff, \$124, and also the sum paid for him for freight and cartage on things sent them for use by the plaintiff, \$29.50, and interest on said sums from the 13th day of June, 1866, which, at the date of the report, amounted to \$176.72. Which sum, being deducted from the amount recovered by the plaintiff, leaves a balance

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of \$6669.78, for which sum the plaintiff was entitled to judgment against the defendants.

J. M. Robertson, for the appellants.

I. By the contract the respondent agreed to furnish the machinery in a reasonable time, and expressly guaranteed it "all to be of the best material, and subject to the approval of your (appellant's) engineer," and in perfect running order. (a.) This was an absolute guaranty against all contingencies. The price to be paid was the consideration for such an assumption of liability. (b.) Where the law imposes a duty upon a party, unforeseen accidents or the act of God may excuse him from performance. But where he imposes it upon himself by contract of guaranty, he is not excused from fulfillment, although prevented by the act of God. (*Harmony v. Bingham*, 12 *N. Y. Rep.* 99.)

II. The referee erred in his finding, "that the engine and boilers, when delivered to the defendants, were of the best material in common use for such purpose, and were in perfect running order," although he finds that they were not new, and had been used for six months. (a.) The referee has found the first mentioned fact not only without any evidence to sustain it, but contrary to the undisputed fact, as found by himself, that the defendants attempted to use said engine, and while so attempting to use it, and while steam was in the boilers, one of the flues collapsed. The collapse occurred while they were attempting to use the boilers for the purpose for which they were intended. They were never in running order, for in the attempt to run them the collapse occurred. The respondent recognized this as a fact, and immediately removed all the old flues and replaced them by others.

III. The referee erred in his conclusion of law, "that the plaintiff is not liable to the defendants for damages resulting from the collapse of said flue, arising from the loss

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of the use of the engine and boilers and other machinery, for the time." (a.) The referee has found the fact that the appellants were deprived of the use of all said machinery from the 25th of April to the 13th of June; and that during that period the work of the mill was retarded, the amount of cloth manufactured was less, and of less value than it would have been if the flues had not collapsed. (b.) The respondent having agreed to do this work, the law implies that he was to do it in a reasonable time. (2 *Pars. on Cont.* 660, 5th ed. *Sansom v. Rhodes*, 8 *Scott*, 544. *Davis v. Tallcot*, 2 *Kern.* 184.) He himself has fixed what was a reasonable time to complete the work, by giving possession of it as a finished job on the 25th of April. It was not finished until the 13th of June. The failure of the respondent to complete his work at the time, renders him liable for actual damages. (3 *Pars. on Cont.* 155, *et seq.*)

IV. The referee erred in finding that the engineer of the defendants approved of the boilers after the collapse. The evidence is conclusive that he did not approve of the boilers, and there is no evidence to the contrary. By the agreement the approval of the engineer was a condition precedent to the payment. It is entirely competent for parties thus to contract. (*Smith v. Brady*, 17 *N. Y. Rep.* 173-176. *Butler v. Tucker*, 24 *Wend.* 447.)

Brown & Estes, for the respondents.

I. The referee's finding, that the plaintiff was not liable, is fully justified and right, for the following reasons: He had previously found that the engine, boilers and flues were of the size, proportions and character called for by the contract, and that they were made of the best material, and were in perfect running order. That the collapse was caused by pressure of steam on the flue, not from defect in the material. That the engineer approved of the boilers, and they were "without fault."

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II. The findings of the referee, and his conclusions, are fully sustained by the evidence. (a.) The defendants' engineer approved of the engine, boilers, flues and all. This was the completion of the job and performance of the contract by the plaintiff. It was an acceptance of the boilers, &c., as a compliance with the agreement. (b.) The inequalities and consequent damage of the cloth manufactured, were owing to other causes than want of power. (c.) The flue collapsed after the fire had been on from five to eight hours; much more than enough to get up full pressure of steam, and the pressure of steam in fact caused the collapse. (d.) The damages claimed by the defendants were speculative, and not allowable. (e.) The defendants examined the boilers and flues for themselves before purchasing, and bought with full knowledge or opportunity to know what they were. (f.) The mill manufactured as much or more cloth intermediate the collapse and completion of repairs than before. (g.) The power was insufficient before the new boilers were got, and same damage resulted then to the goods, as after the collapse. (h.) The boilers were tested to 130 lbs. pressure and stood it well, and they were in all respects what the contract called for. (i.) The collapse occurred from other causes than defective flues, to wit, from breaking of steam pipe by fall of timber upon it. (j.) The engine, boilers and everything were in perfect working order. (k.) The contract does not bind the plaintiff to furnish the boilers, &c., within any specified time. He was simply to furnish engine, boilers, &c., to be approved by the defendants' engineer, and this he has done.

III. The plaintiff's contract was to deliver boilers, &c., that should be approved by the engineer of the defendants. When the boilers were delivered they were not accepted till other flues had been put in, and then were approved and accepted by the defendants' engineer. This was a full compliance with the contract, and performance there-

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of. The contract gave the plaintiff the right, if the boilers were not accepted and approved, as first delivered, to deliver others or improve those until they should be approved. This is the true construction of the contract, and it is absurd to say that the plaintiff is responsible for loss of use of the mill, or anticipated profits on goods to be manufactured, while he should be doing what his contract gave him the right to do, to wit, furnishing such boilers as should be approved by the defendants' engineer. The contract contemplated that the first attempt might not be satisfactory or approved, but the plaintiff was to make it satisfactory, which he ultimately did, as the defendants' engineer and witness swears. Again; the contract does not bind the plaintiff to deliver or furnish approved boilers, &c., within any specified time. How, then, can the defendants recover for the use of the mill, profits on cloth, work or board. The words, "all to be of the best material," are merely descriptive of the class of material. There is no warranty in the agreement.

IV. But if the agreement is to be construed as containing a warranty, binding the plaintiff to deliver articles of the "best material," in the first instance, and as a "guaranty" that the same should be in "perfect running order," so that the defendant could maintain an action for non-compliance, still it is insisted and submitted that the proof shows that the plaintiff fully performed. The proof all shows that the material of the first as well as the last flues, was the best ever used, unless a certain other specific brand is designated and contracted for; and the proof also shows that the whole was in perfect running order. Again; it is submitted that the warranty (if one) only related to the job when completed, and not to such portions of the articles as might be rejected in doing it, so as to be approved by the defendants' engineer. The only words of warranty, if any, are, "all to be of the best material and in perfect running order." It will be noticed that

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there is no agreement that it shall be new, or that the flues will not collapse, or will sustain any given amount of pressure, or afford any given amount of power, or that all shall be in perfect running order within any designated period. All that was necessary to fulfill the agreement was, that the material called by the trade the "best," should be furnished, and the machinery in perfect running order, which the proof shows it was.

V. The evidence entirely satisfies the mind that the collapse of the flue arose from an over pressure of steam, or from the concussion by the breaking of the steam pipe, or from some other of the numerous causes which the witnesses say might produce the collapse. The fire was up much longer than required to get full pressure, as both Cassidy and Unguelter swear. The collapse could not have arisen from defective flue, for it had been thoroughly tested three or four times previously, and stood the test well.

VI. If the defendants could establish any counter-claim at all, (which we utterly deny,) it would be upon the ground of warranty of the articles. If a warranty were established, on which the defendants could recover, the measure of damage would be the difference between the value of the articles if as warranted, and their value as they were in fact. Yet the defendants have not even attempted to establish one penny of damage on this principle, but have gone into the question of speculative or possible profits of their mill, which are not recoverable on any principle known to the law. (*Blanchard v. Ely*, 21 Wend. 342. *Hadley v. Baxendale*, 9 Eng. L. and Eq. R. 67. *Griffin v. Colver*, 16 N. Y. Rep. 489.)

VII. The defendants having bought the boilers after a full inspection, and opportunity to see all defects, if any, must be deemed to have relied upon their own examination and judgment, and not upon any warranty. They are therefore remediless.

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By the Court, INGRAHAM, P. J. The contract in this case was to furnish an engine, boilers, &c., to be of the best materials and subject to the approval of the engineer, delivered on board of a boat, &c. The plaintiff was to guaranty that they should be in perfect running order. No time for the completion of the work was stated in the contract.

The engine &c. was delivered about the 1st of March, 1866, and the defendants gave the notes in suit in payment, one dated 1st March, 1866, and one dated 10th April, 1866. About the 25th of April, 1866, on attempting to use the engine, one of the flues collapsed, so as to prevent the further use of it. The defendants applied to the plaintiff, who promised to repair the flues, putting in new ones, which repairs were completed in June following, when the same were used by the defendants.

The referee found that the engine was approved by the engineer, but the boilers were not passed upon, by him; but that they were approved by him after the repairs, and were without fault; and gave judgment for the plaintiff for the amount due on the notes.

Some of the findings of the referee upon the facts are not sustained by the evidence, and if the question in this case was whether the defendants were bound to accept the engine when tendered, I should be of the opinion that the report could not be sustained.

But it seems to me that this judgment must be affirmed upon other grounds.

There was no time stated for completing the contract. When the engine was delivered, it is conceded to have been within a reasonable time, which is all that the contract required. When so delivered, it was the duty of the defendants to have had it inspected and passed upon by the engineer. If it was not approved of by them it should not have been accepted. If it be said that its sufficiency could not be determined until after trial, when the flue

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collapsed and the defect was discovered, the defendants should then have notified the plaintiff of their determination not to accept it. Instead of doing so, they permitted him to make alterations, and when altered, they accepted it, and according to the findings of the referee, their engineer approved of it, and they continued to use it, afterwards.

Under the evidence and the finding of the referee, we must come to the conclusion that after the flues were altered and new ones substituted, the engine and boilers were approved and accepted. The only question then would be whether, for the delay caused by the substitution of new flues, the defendants could recover damages.

It is said by Pratt, J., in *The Ilion Bank v. Carver*, (31 Barb. 236 :) “In executory contracts, if a fraud has been perpetrated against a party, and he goes on and performs the contract, on his own part, he will be deemed to have waived all objections which he might have made on account thereof. In such a case, after having performed without objection, he can neither repudiate nor sustain an action for damages.”

So in *Smith v. Brady*, (17 N. Y. Rep. 187,) Comstock, J., says: “A person may accept a benefit under a contract of which the conditions precedent have not been performed by the other party; and he may do this in such circumstances that a new obligation to pay for the benefit will arise.”

In *Vanderbilt v. The Eagle Iron Works*, (25 Wend. 665,) there was an engine to be constructed, and when put on board the steamer was deficient in some respects from the contract; and the court held that the acceptance of the engine on board of the boat, and continued use and enjoyment, was to be deemed a waiver of the condition before payment of the money, and that all that could be required was a supply of the deficient articles.

Here the defect was remedied by the maker with the

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assent of the purchaser, and his continued use of the engine since is an acceptance of the same, and a waiver of any claim on account of the previous defect.

Judgment affirmed.

[FIRST DEPARTMENT, GENERAL TERM, June 6, 1870. *Ingraham*, P. J., and *Cardozo* and *Geo. G. Barnard*, Justices.]

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TREDWELL W. REMSEN and JAMES HANNEGAN, plaintiffs in error, vs. THE PEOPLE, defendants in error.

On the trial of an indictment for larceny in stealing "promissory notes," a witness testified, that the bills stolen "were of the currency ordinarily known as greenbacks." *Held* that this proof was some evidence, at least, of their genuineness, and when taken in conjunction with the further fact, to which he testified, that they were of the denomination of one hundred dollar bills of that currency, there was enough evidence, also, of the value, to sustain a conviction.

Where the judge, on such a trial, charged the jury that good character should not shield the prisoners, if from all the testimony (which of course included that upon the subject of character) the jury believed them to be guilty; that they were to consider all the evidence, and where they had a well reasoned doubt arising out of *all the testimony*, good character should protect the prisoners, and should ensure their acquittal if the jury had "any reasonable doubt arising out of the whole of the testimony;" *Held* that the charge should be all taken together, and so taken, it could not have misled the jury.

ERROR to the New York general sessions. The prisoners were indicted for grand larceny, in stealing from the person of George W. Wells, "promissory notes for the payment of money, being due and unsatisfied, and of the kind known as United States Treasury notes," of different denominations and values; "promissory notes for the payment of money; of the kind known as bank notes, being due and unsatisfied," of different denominations and values; "bank bills of banks to the jurors unknown, and

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of a number and denomination to the jurors unknown, of the value of one thousand dollars;" due bills of the United States, of the kind known as fractional currency, due and unsatisfied, of different denominations and values; and coin of various kinds and denominations. On the trial, Wells testified to the stealing from his person, by the defendants, who were policemen, of his wallet, containing from \$430 to \$435; that there were three bills, of the denomination of \$100 each, and the balance was in small bills, of sizes not remembered; that it was of the currency ordinarily known as greenbacks.

Testimony as to the previous good character of the prisoners was given. Upon that subject the recorder charged as follows: "They (the prisoners) bring evidence of previous good character, and certainly, so far as character is concerned, both these men have shown an exemplary character from childhood up, which has been vouched for by the fathers of the respective men, and by gentlemen who are well known in this community, as has been stated to you by the district attorney in his summing up; where the evidence is positive, leading you to a conviction, logically and fairly derived, of guilty, from all the testimony, the simple fact that a person possesses previous good character will be of no avail. It is only in cases where you have a well reasoned doubt, a doubt logically arrived at, arising out of all the testimony, that evidence of good character steps in, and then it becomes your duty under your oath to give a verdict in favor of the prisoner; such will be your duty on this occasion, if you have any such doubt arising out of the whole of the testimony."

The prisoners' counsel requested the court to charge,

First. That the evidence failed to show with sufficient certainty what was the character of the money alleged to have been stolen, to sustain a conviction of grand larceny charged in the indictment.

Second. That the evidence failed to show with sufficient

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certainly what was the value of the money alleged to have been stolen, to sustain a conviction of grand larceny charged in the indictment.

Third. That good character was a fact to be considered by the jury, like every other fact in the case, no matter what the other testimony in the case might be.

The court charged the third proposition, but declined to charge the first and second.

The jury found a verdict of guilty, against both defendants.

S. H. Stuart, for the plaintiffs in error.

I. The evidence fails to show with sufficient certainty what was the character of the notes alleged to have been stolen, to sustain a conviction; and it also fails to show that they were of sufficient value to sustain a conviction, as charged in the indictment, where it appears that the attention of the court and of the district-attorney was called to these defects of proof, before the case was given to the jury, that they might be cured by further testimony, if it were possible to do so. The only evidence in the case, respecting the character and value of the property stolen, is in the testimony of Wells: "I had from \$430 to \$435; there were three one hundred dollar bills, and the balance was in small bills; I do not know the size; it was of the currency ordinarily known as greenbacks." 1. The indictment avers that a great variety of specified kinds of property was taken, and includes a large number of different promissory notes for the payment of money, due and unsatisfied, of the aggregate value of over \$10,000, (also a variety of gold, silver and other coins and fractional currency,) all specifically described. The "promissory notes" which the plaintiffs are charged with stealing, are, in the indictment, divided into three classes. 1st. "Promissory notes for the payment of money being then and there due and unsatisfied, and of the kind known as United

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States Treasury notes," of different denominations and values. 2d. "Promissory notes for the payment of money of the kind known as bank notes, being then and there due and unsatisfied," of different denominations and values. 3d. "Bank bills of banks to the jurors unknown, and of a number and denomination to the jurors aforesaid unknown, of the value of \$1000." Promissory notes and bank bills were not the subject of larceny at common law. (*Arch. C. P.* 165. *State v. Tillery*, 1. *N. & Mc.* 6, 9. *Rex v. Watts*, 24 *E. C. L. R.* 573. *U. S. v. Bowen*, 2 *Cranch*, *C. C.* 133. *U. S. v. Carnot*, *Id.* 469.) But having been made so by statute, and this being a purely statutory larceny, the articles stolen must be particularly described by pleading and by proof, that the court may see that the taking amounts to a larceny, at law; for if it does not appear by the pleading, and is not shown by the proof, that the property stolen is covered by the statute, no conviction can be had. (*See* 2 *R. S.* 679, § 66, 3d ed.; 2 *East P. C.* 1118; *Craven's case*, *Russ. & Ry.* 14, 110.) There is no evidence in this case that the prisoners took any one of any of the various kinds of articles described in the indictment. It is not enough that the jury find, generally, that a sum of money, of the value of \$430, was taken, consisting of some one or more of the notes or bills described. They must be able to say, from the evidence, exactly what it was that was taken. Here, no one thing specified in the indictment is referred to in the evidence; no "promissory note" is mentioned—there is no reference to a "treasury note," or to a "bank note," or to a "bank bill." In larceny, there must be an averment of the specific article, and there must be proof relating to that article. (*Rex v. Forsyth*, *R. & R.* 274. *Rex v. Fry*, *Id.* 482. *Rex v. Bond*, 1 *Den. C. C.* 517.) The whole value of the property alleged in the indictment to have been stolen is over \$10,000, while the whole amount proved to have been lost is less than \$500. No one can say whether

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any, and if any, which of the articles it was that were taken. In *Bond's case*, above cited, the prisoner was indicted for stealing seventy sovereigns, one hundred and forty half-sovereigns, and so on, enumerating all possible descriptions of coin. The evidence was, that coin of the value of seventy sovereigns had been stolen by the prisoner, but the witness was unable to state any one coin contained in the lot taken. It was objected that there was no evidence to show that the prisoner had taken any particular description of coin. In order that this question might be considered by all the judges, the court charged the jury that they could convict, if they were satisfied that the prisoner had taken a sum of money consisting of some of the coins mentioned in the indictment, although they could not say which. Upon a case reserved, the judges decided that no evidence could go to a jury respecting the whole or any part of a count, unless it clearly applies either to the whole or to some definite part of it. That in the case before them, the only construction which could be put upon the verdict, when viewed in the light of the testimony, was that the prisoner had either stolen sovereigns, or half-sovereigns, or crowns, or some other coin among the list of coins; that the mere taking was nothing, unless there was a taking of some specific coin. Baron Alderson, in delivering the judgment of the court, says: "We think this conviction wrong; the count includes all kinds of money, and must be treated exactly as if the indictment contained a series of counts, each charging one species alone; and it is clear that the jury could not find a man guilty, unless they could affirmatively say that he was guilty of stealing some definite thing described in one of the counts; and the same rule must, we think, apply if they are all included in one count. Suppose a conviction under this charge, and a subsequent indictment for stealing sovereigns. How is the prisoner to plead and prove that he has been before convicted of that offense?

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All the proof he could then give, if this verdict stand, would be either that he had been convicted of stealing sovereigns, or half-sovereigns, or crowns, or some other species of coin. We think this cannot be just to a prisoner; on the other hand, if he has been convicted of the definite crime of stealing sovereigns, and acquitted of the rest of the charge, he has his future defense either on the plea of a former conviction or acquittal as to the whole charge. But on this verdict, it is impossible to say whether he is acquitted or convicted of any particular portion of this count; he is certainly not convicted of the whole." Even if it might be held that an indictment would be good which charged the stealing of a gross sum of money, stating the value in gross, yet that could not avail in this case; because here, in this particular indictment, the property is specially described, and alleged to be of several certain and particular kinds. Whatever laxity of description may or not be allowed in indictments for larceny, the rule is rigid that a description being given, it cannot be rejected as surplusage, but is matter of substance, and must be proved as laid. There are many authorities on this point, a part of which are here noted. (6 *Am. Law. Reg.* 93.) "Surplusage in an indictment consists of such matter only as is in no way essential to the description." (See *U. S. v. Porter*, 3 *Day*, 283.) "Averments that might have been dispensed with, if inserted as descriptive of that which is essential, cannot be rejected as surplusage, and no matter how unnecessary they are, they must be proved as laid." (See also *U. S. v. Howard*, 3 *Sumn.* 12; *Alkenbrack v. The People*, 1 *Denio*, 80; *Arch. C. P.* 66; *The People v. Jackson*, 8 *Barb.* 637; *Whar. A. C. Law*, 361; *The People v. Wiley*, 3 *Hill*, 194; *State v. Clarke*, 3 *Foster*, 429; *Commonwealth v. Morrill*, 8 *Cush.* 571; *State v. Hughes*, 1 *Swan*, 262; *Commonwealth v. Williams*, 2 *Cush.* 583; *State v. Morrison*, 24 *Miss.* 36; *Commonwealth v. Eastman*, 2 *Gray*, 76; *State v. Shoemaker*, 7 *Mo. R.* 177; *Com-*

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monwealth v. Wentz, 1 *Ashm.* 269; *State v. Sansom*, 3 *Brev.* 5; *State v. Tootle*, 2 *Harr.* 541; *State v. Harris*, 3 *id.* 559; *Commonwealth v. Copp*, 15 *N. H. Rep.* 212; *Commonwealth v. James*, 1 *Pick.* 376; *Rex v. Edwards*, *R. & R.* 497; *Rex v. McDermott*, *Id.* 356; *Rex v. Duffin*, *Id.* 365; *U. S. v. Foye*, 1 *Curtis C. C.* 362; *John. v. The State*, 24 *Miss. R.* 569.) It follows, therefore, that the descriptive averments, that the property stolen consisted of "promissory notes for the payment of money then and there due and unsatisfied," and "promissory notes for the payment of money of the kind known as bank notes, then and there due and unsatisfied," are in all respects material, and the proof must show that those things were stolen. Now the proof in this case is, that the witness lost "three \$100 bills."

The only reference in the indictment to bills, is to "bank bills of banks to the jurors aforesaid unknown, and of a number and denomination to the jurors unknown, of the value of \$1000." In order to bring them within the description of this averment, the evidence must show not only that these three \$100 bills were *bank* bills, were due and unsatisfied, and that they were collectively of the precise value of \$1000. It is a rule always adhered to, that when an indictment charges a larceny of articles collectively, assigning a gross value to the lump, (as this averment about bank bills does,) there cannot be a conviction of stealing a part of the gross value alleged. (*Rex v. Forsyth*, *R. & R.* 274. *Commonwealth v. Smith*, 1 *Mass. R.* 245. *The People v. Wiley*, 3 *Hill*, 194. *Wilson v. State*, 1 *Por.* 118. *Hope v. Commonwealth*, 9 *Metc.* 134. *O'Connell v. Commonwealth*, 7 *id.* 460. *Commonwealth v. Morrill*, 8 *Cush.* 571. *Whart. Am. C. L.* 613.) When the substance of the charge is stealing an unknown number of promissory notes, and the gross value is charged, the actual value must be stated, and that value must be proved as stated. An omission to do either is fatal. Here, the only fact of description, and the only means of identification of the "bank bills," is the fact of value, viz.,

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that they were of the value of \$1000, and a variance between the proof and this description must defeat a conviction. If the parcel of bills charged to be stolen and to be of the gross value of \$1000 are not proved to be of that value, then it is not that parcel to which the proof relates. Nor can it be said that the use of the term "greenbacks" by the witness, in his evidence, is a description of anything mentioned in the indictment. The property there described are "promissory notes, due and unsatisfied," and the like; and, as has been said, nothing which is descriptive of the property alleged to have been stolen, whether it be necessary or not, can be considered as surplusage, but is matter of substance, and must be proved as laid. See the authorities above cited, and also, *U. S. v. Clew*, 4 *Wash. C. C.* 700; *Whart.* 361, 629, 630; *Commonwealth v. Atwood*, 11 *Mass. R.* 93; *Commonwealth v. Tuck*, 20 *Pick.* 356, 364; *U. S. v. Lancaster*, 2 *McL.* 431; *U. S. v. Keen*, 1 *id.* 429; *State v. Noble*, 15 *Me. R.* 476; *U. S. v. Brown*, 3 *McL.* 233; *Rex v. Craven*, *R. & R.* 14; 3 *Hill, So. C. R.* 1; *Thatcher C. C.* 722. The term "greenbacks," I need hardly say, is not definite, and certainly is not confined in its use to the notes and bills embraced by the indictment, and therefore clearly cannot be accepted as proof of what the particular things stolen consisted of.

2. The evidence fails to show that the things charged to have been taken were of any value whatever. The statute determines how the value of promissory notes, &c., is to be measured. "The amount due thereon, or secured thereby and remaining unsatisfied, shall be deemed to be the value thereof." (2 *R. S.* 4th ed.) Although all the "notes" in the indictment are therein described as being "due and unsatisfied," there is not one word of proof that such was the fact; and, therefore, there is not one word of proof that they were of any value whatever; for unless there was something "due thereon," or "secured thereby and remaining unsatisfied," there is nothing by which

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their value, as far as larceny is concerned, can be determined; for the statute says that *that* shall be their value for the purposes of a prosecution for the larceny of them. (*See The People v. Loomis*, 4 Denio, 380.) The phrase, "three \$100 bills, greenbacks," is no evidence of the value of these bills or of their genuineness, or that they had ever been received or paid as genuine and valuable bills. The witness states he had \$430, but that single and simple statement is no proof of the value and genuineness of the bills of which he supposed that amount to consist. The word "dollar" imparts no value, and is only a term used in computation to express a value existing somewhere else, and consisting of some particular thing. So the words "four hundred and thirty dollars," in the evidence, are meaningless, (except in an abstract sense,) and cannot be taken as proof imparting value to the unknown number of "bills" claimed to have been stolen. It was held, (*Rex v. Fry*, R. & R. 481,) that the words "ten pounds," in an indictment for larceny, conveyed no idea of value. See also *People v. Johnson*, (4 Denio, 364,) which is an authority conclusive upon this point. The statement of the complaining witness can be taken to mean only that he lost what purported to represent that amount, nothing more; whether it was in fact of that value, or any value, is entirely uncertain. (*Johnson v. The People*, 4 Denio, 364.)

II. This indictment is for larceny from the person. There was a general verdict of guilty. Under that verdict, had the proof shown that the amount stolen was less than twenty-five dollars, the prisoners could still have been punished as for grand larceny; they might also have been punished as for petit larceny. (*Laws of 1860, ch. 508, § 33.*) The Court of Appeals have expressly held, and that too on an indictment precisely similar to this, that the prisoner, in all cases where this form of indictment is used, has a right to require that the jury find whether the value proved exceeds twenty-five dollars or not. Had the court

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charged the jury in this case in accordance with the law, and (upon the subject of value) as requested by prisoners' counsel, they would have found the exact value of the property stolen. As it is, their general verdict fixes it at \$10,000, while the proof shows that it did not amount to one-twentieth part of that sum, which leaves it entirely possible that if the jury had been instructed in the law, they might have convicted the accused of petit larceny from the person, instead of grand larceny. (*See Williams v. The People*, 24 N. Y. Rep. 405.)

The view of the weight and effect of good character taken by the recorder in his charge, has been long since repudiated by the courts, both in this country and in England. "It has been usual," says Sir William Russell, "to treat the good character of the party accused as evidence to be taken into consideration only in doubtful cases. Juries have generally been told that where the facts proved are such as to satisfy their minds of the guilt of the party, character, however excellent, is no subject for their consideration; but when they entertain any doubt as to the guilt of the party, they may properly turn their attention to the good character which he has received;" (almost the words of the recorder in this case;) "it is, however, submitted that the good character of the party accused, when satisfactorily established by competent witnesses, is an ingredient which ought always to be submitted to the consideration of the jury; * * and the correct course seems to be, not in any case to withdraw it from consideration, but to leave the jury to say, from the evidence, whether an individual, whose character was previously unblemished, has, or has not, committed the crime laid to his charge." (2 *Russell on Crimes*, 785.) Sergeant Talfourd says: "According to the language used by judges in their charges, character is in no case of any value. They say that, in a clear case, character has no weight; but if the case be doubtful, if the scale hang even, then the jury ought to throw the

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weight of character in the scale, and to allow it to turn the balance in favor of the prisoner. But the same judges will tell juries that, in every doubtful case, they ought to acquit, stopping far short of the even balance, and that the prisoner is entitled to the benefit of every reasonable doubt. In clear cases, therefore, character is of no avail, and in doubtful cases it is not wanted. It is never to be considered by the jury but when the jury would acquit without it. The sophism lies in the absolute division of cases into clear and doubtful, without considering character as an ingredient which may render that doubtful which would otherwise be clear." (*Dick. Quar. Sess. 6th ed. 563.*) In this country, the view taken by these learned jurists has been adopted and approved wherever the subject has been brought before the courts. In *The People v. Lamb*, (2 *Keyes*, 378,) the judge at the trial had charged on the subject of character; in reviewing which, the Court of Appeals say: "In so far as the charge left it (good character) to the discretion of the jury, to utterly disregard the uncontradicted evidence of the defendant's good character, (and it seems to have done so, unqualifiedly,) it was erroneous, and prejudicial to the defendant. The rule is, that such evidence must in any event be considered by the jury together with the other circumstances of the case. It is not merely of value in doubtful cases, but will of itself sometimes create a doubt where none could exist without it," &c. See also, to the same effect, *Cancemi v. The People*, 16 *N. Y. Rep.* 501; *Stevens v. The People*, 4 *Park.* 396; *Felix v. The State*, 18 *Ala. Rep.* 720; *State v. Ford*, 3 *Strobhart*, 517; *Webster's case*, 5 *Cush.* 295; 5 *Porter*, 382; *Ryan v. The People*, 19 *Abb. Pr. R.* 232. That this portion of the recorder's charge was "erroneous, and prejudicial to the prisoner," seems certain, and therefore is necessarily a ground for reversal of the judgment.

An erroneous charge will be reason for setting aside a verdict, unless it is shown that the error did not affect the

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verdict. It is not for the party aggrieved to show how he was injured by it; it is for the people to show that no injury could possibly have arisen from the error. (*Greene v. White*, 37 *N. Y. Rep.* 405. *Clarke v. Dutcher*, 9 *Cowen*, 674. *C. and A. Railroad Co. v. Belknap*, 21 *Wend.* 354. *The People v. Wiley*, 3 *Hill*, 194. *Thatcher v. Jones*, 31 *Maine Rep.* 528. *Lane v. Crombie*, 12 *Pick.* 177. *The People v. Bransby*, 32 *N. Y.* 525.) If it be said that the request to charge, with the recorder's remark, "I charge your third proposition," is to be taken as a portion of the charge to the jury, it is a sufficient reply to state that the words of the request were written, and read by the counsel for the prisoners to the court; that the proposition of law therein contained was not declared by the recorder to the jury; that the attention of the jury was not called to it, either by court or counsel; that although they, or some of them, may have heard it read by the prisoners' counsel, it still was not addressed to them; that the recorder's remark in reply was directed to the counsel and not to the jury, as his words show: "I charge your third proposition;" that there was three (and it would have been the same had there been twenty) propositions contained in the request; that the recorder, in accepting and declining them, referred to them by number, and not by mentioning the matters which he approved or denied; that the jury, even had they heard them read to the court by counsel, are not supposed to recognize important legal propositions by the number which the judge uses to distinguish them from each other, (and where the series is long no one could do it, even with the strictest attention,) and that the true intentment of a request to charge is, that the judge will embody the matters contained in the request in the instructions he gives to the jury, when he commits the case to them. (See *Colquitt v. Thomas*, 8 *Geo. R.*) Now, if it is to be taken and understood that, in his charge to the jury, the recorder embodied this request, then I say that whether he told the

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jury they must consider the question of good character like every other question in the case, or not, it is beyond contradiction that he told them that good character was of no avail, except in a doubtful case, &c., which is error equally certain, and fatal in this as in any other view of the question. But I respectfully repeat that when the recorder actually came to charge the jury, he not only did not charge this proposition, but charged, in practical effect, as absolutely contrary to its purpose and spirit as it was possible for him to do. "Where the evidence is positive, leading you to a conviction, logically and fairly derived, of guilty from all the testimony, the simple fact that a person possesses previous good character will be of no avail. It is only in doubtful cases * * * that evidence of good character steps in," &c.

S. B. Garvin, (dist. att'y,) for the people.

By the Court, CARDOZO, J. This case differs, essentially, from that of *Johnson v. The People*, (4 Denio, 364,) relied on by the prisoners. In that case there was no proof of the existence of the banks, which were foreign ones, which it was claimed had issued the notes; nor any evidence of their genuineness. Had there been any—even that the bills had been passed as genuine—and it had been left to the jury to say, upon that, whether the banks existed, and whether the notes were genuine, it is plain that the judgment would have been sustained. Here the witness testified that the bills stolen "were of the currency ordinarily known as greenbacks," a term, as applied to money, well understood. I think this proof—that these particular bills were part of that currency—is some evidence, at least, of their genuineness; and when taken in conjunction with the further fact to which he testified, that they were of the denomination of one hundred dollar bills of that currency,

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there was enough evidence, also, of the value, to sustain the judgment.

Respecting the exception to the charge upon the subject of character, I think it enough to reiterate, substantially, what I said upon the motion for a stay of proceedings. The charge of the recorder should all be taken together, and I think could not have misled the jury. The recorder, in accordance with the request of the prisoners' counsel, and in the language of the request, charged "that good character is a fact to be considered by the jury, like every other fact in the case, no matter what the other testimony in the case may be." A fair examination of the charge shows that the recorder only meant to tell the jury that good character should not shield the prisoners, if from all the testimony—which of course included that upon the subject of character—the jury believed them to be guilty. That the jury were to consider all the evidence, is repeated by the recorder in several forms. He said to the jury, "where you have a well reasoned doubt arising out of *all the testimony*," good character should protect the prisoners, and should ensure their acquittal in this case, if the jury "have any such doubt arising out of the whole testimony."

Upon the whole, I think the judgment should be affirmed.

Judgment affirmed.

[FIRST DEPARTMENT, GENERAL TERM, June 6, 1870. *Ingraham*, P. J., and *Cardozo* and *Geo. G. Barnard*, Justices.]

MARTIN ALLEN, plaintiff in error, *vs.* THE PEOPLE, defendants in error.

In the impanneling of the jury, in a criminal case, one of the jurors was asked "if he had formed an opinion as to the general character of the prisoner?"

He replied that he had; that "his general character was bad;" and that "he (the juror) was biased." *Held* that these admissions rendered the juror incompetent. INGRAHAM, P. J., dissented.

Whatever objection there may have been, under the English system, to two grand juries sitting in the same county at the same time, the Code has relieved the difficulty. The 20th section directs that the courts of oyer and terminer shall be held twice annually, in every county, and as many more terms as the judges shall appoint. The 23d section provides for extra courts to be appointed by the governor, and the 24th section provides for the adjournment of any court to a future day. The holding of one branch of the court does not prevent the holding of the regular courts as directed by the statute. *Per* INGRAHAM, P. J.

ERROR to the New York general sessions. The plaintiff in error was indicted in the court of oyer and terminer, in the county of New York, on the 9th of November, 1869, for grand larceny, in stealing money from a house. The indictment was afterwards ordered to be sent to the court of general sessions for trial. On the trial there, Thomas F. McDowell, a juror, being challenged for favor, was asked if he had formed any opinion as to the prisoner's general character. He replied that he had. Q. "What is the opinion?" A. "Well, as to his character, I have heard nothing; I am biased." Q. "What is the opinion you have formed as to his general character?" A. "My general opinion is that it is bad." The prisoner's counsel requested the court to charge the triors, as matter of law, that the juror was incompetent. This was refused, and the question was submitted to the triors, who found him to be competent.

Before the jury were sworn in chief, the prisoner's counsel interposed a special plea, viz: That the grand jury by whom the indictment was found on the 9th of November, 1869, of which grand jury Charles H. Haswell

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was the foreman—a grand jury held in the court of oyer and terminer, presided over by Mr. Justice INGRAHAM, and convened on the 1st Monday in October, 1869—was an illegally constituted grand jury and tribunal, as at the time the grand jury preferred and found this bill of indictment, a grand jury previously duly impaneled according to the law and the statute in such case made and provided, was then in session at the court of oyer and terminer, then being held before his honor ALBERT CARDOZO, one of the justices of the Supreme Court; and this the defendant was ready to verify.

The court overruled the plea, upon the ground that such plea should have been interposed before pleading to the indictment; and that having pleaded not guilty, without raising the objection, the prisoner had waived the right to urge it afterwards.

The jury having found the prisoner guilty, his counsel moved, in arrest of judgment, that the indictment on which the prisoner had been tried and convicted was an invalid one; and one illegally found and presented, by a grand jury illegally held and unlawfully constituted and impaneled, and which was presided over by Justice INGRAHAM; there having been, at the time such grand jury was impaneled, a lawfully and legally impaneled grand jury of an oyer and terminer then actually in session, over which the honorable ALBERT CARDOZO presided, at a lawfully constituted court of oyer and terminer, in and for the city and county of New York; it being expressly contrary to law that two grand juries should be in session in the same county, at the same time. And counsel also moved, on the same grounds as set forth in the special plea offered to be interposed by prisoner's counsel before the jury were sworn; but the court denied the motion, upon the ground that there was no such question properly before the court; and the prisoner's counsel excepted.

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Wm. F. Howe, for the plaintiff in error.

I. The court of general sessions had no jurisdiction of the case, nor of the prisoner, for purposes of trial. Because the indictment upon which he was arraigned had been presented by a body of men acting as the grand jury of the county for the court of oyer and terminer, but which was not the grand jury of the county in that court, and had no lawful authority to act as such. There was a properly authorized, appointed, organized and created grand jury then and there in existence and in session, and there could not be two grand juries in and for the said court at one and the same time. Under the old English law there could be two grand juries in the same county, in two courts of different jurisdictions, in the same county. (2 *Hale's P. C.*) There never was a time, even at the common law, when there could be two courts at the same time, each with a grand jury, in the same county, where the courts had identically the same jurisdiction. The case seems never to have been suggested in the books, until, owing to the peculiar composition of the court of sessions, viz., that it should be composed of two or more justices of the county, one of whom should be of the quorum, the question was proposed as one which might occur. It was admitted that under the law any two justices of the county, one of them being of the quorum, could hold courts of sessions at any place in the county appointed by them, and could issue precepts, &c. This question was raised by Mr. Justice Lambard, "That if two or more justices appoint a sessions to be holden in one town, and so many more appoint a sessions in another town, the same day, are the presentments made in both good?" And it was concluded that they were both bad and void, for being both equal in authority, one might present a matter one way, and the other might present the same matter in a manner directly the reverse of it, and which should prevail? And that the justices by whose forwardness such

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division happens, or on whom such miscarriage happens, are punishable by information and fine, or putting out of commission, as the case shall require. (*Dalt. ch. 185. Burns, tit. Sessions.*) Thus it appears that if there be two courts of different powers, or having a different limit to their jurisdiction, they may each issue their precept for a jury to inquire, &c.; but that in the same court, or in branches of the same court, but one jury can be sworn at once, or at one term; though it is held that after the discharge of a grand jury, another one may be sworn in the same court. Lambard says (*lib. 4, ch. 5*) of grand juries: An indictment is an accusation at suit of the king by the oaths of twelve men of the same county wherein the offense was committed, returned to inquire of all offenses in general in the county, which are determinable by the court into which they are returned. An indiotment, says an ancient authority, is a bill or declaration of complaint drawn up in form of law, exhibited for some offense criminal or penal, preferred to a grand jury; upon whose oaths it is found to be true before a judge, or others having power to punish or certify the offense. (*Terms de Ley, 293.*) Courts of oyer and terminer were courts of general jurisdiction; courts of sessions of limited jurisdiction; each could issue precepts to the sheriff to return a grand jury to inquire concerning offenses within their respective jurisdictions. The oyer and terminer could not proceed upon indictments not taken before themselves, except by special commission, for they were to inquire, hear and determine; and even justices, having the more general commission of oyer and terminer and general jail delivery, could not proceed upon indictments presented to courts of sessions. (*Wood's Inst. 478. 2 Hawk. 24.*) In this State, our courts of oyer and terminer take the place of, and exercise the powers confided in England to general commissions of oyer and terminer and general jail delivery. The only difference is, that here certain periods and

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persons are appointed for the holding of them; there, a commission is issued for each assizes. In England all courts of oyer and terminer are created by the king's commission; here, all courts of oyer and terminer are likewise created by the "king," (the people,) who has said (by law) that instead of issuing a commission for each court of oyer and terminer in each county, there shall be at least two in each county in each year; but the people have reserved the right to create other courts of oyer and terminer by commission. (*See Fitzherbert's Nat. Brev.* 110; *Jacobs' Law Dic.* tit. "O. and T." and "Gaol Delivery;" *Tomlins' Law Dic.* same titles; 4 *Black. Com.* 269; *Miller's case*, 9 *Cowen*, 730; *Laws of 1823*, p. 211, § 9, where certain judges were authorized by virtue of their office to hold the O. and T. "without any other commission;" 2 *R. S.* 378, § 13, *et seq.*; *Laws of 1847*, ch. 280; 1 *R. L.* 1813, 355, *et seq.*; 1 *K. & R.* 174; *Laws of 1683*; *Orders of 1699 and 1704*; *Brad. Col. Laws*, ed. of 1710, appendix; 20 *N. Y. Rep.* 544.) The king of England could never send two contemporaneous general commissions of oyer and terminer to the same county; though, while a court was sitting under such commission, a special commission might be sent down, with jurisdiction only in such cases as were named in the commission. (*See Wood's Inst., Burns Inst., Jacobs' Law Dic.* tit. O. and T.) So in this State the governor may send down a special commission; but not two general commissions at once. But the commission under which Judge CARDOZO opened a court of oyer and terminer, on the — day of —, 1869, was not a special commission, giving only special and limited jurisdiction, but was a general commission, conferring general powers, and the full jurisdiction of any court of oyer and terminer, which (the king) the people had appointed by statute in lieu of by a commission. (*See authorities above, and 20 N. Y. Rep.* 544; *Governor's Proclamation.*) This court of oyer and terminer, by virtue of its general powers, con-

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ferred as above (which were of equal force to any which were conferred upon any court of oyer and terminer by statute) on the — day of —, 1869, impaneled a grand jury “to inquire of all crimes and misdemeanors committed or triable in the said county,” and the said court proceeded to “hear, determine and punish, according to law, all crimes and misdemeanors in the said city and county done and committed,” which were presented by indictment by the grand jury, so lawfully impaneled under the general commission. While this court was in session, while the grand jury were still impaneled and engaged in “inquiring” into all crimes, &c., another general commission was sent down to the same county, or, what is the same thing, Mr. Justice INGRAHAM, by virtue of the statute, “and without other commission,” (*see Laws of 1823, above cited,*) opened a court of oyer and terminer, and impaneled a grand jury, which was also sworn to “inquire into all crimes and misdemeanors committed or triable in said county,” and by whom the plaintiff in error was presented. It thus appears that two courts of oyer and terminer, existing by virtue of the same creative power, (though it was manifested by different signs,) and having in every respect the same jurisdiction, and over the same territory, were sitting at the same time, in the same county, each with a grand jury impaneled and sworn to inquire as to the same matters. This state of things was never contemplated by our laws. 1. It is contrary to the usage and laws of England, as above recited. (*See Burns’ Inst.; Jacobs’ Law Dic.; Tomlins’ Law Dic.; Wood’s Inst.; Dalton; Lambard; Hawk. P. C.; Hale’s Hist. P. C.; East, P. C.; Bacon’s Ab. tit. “Juries,” “Sessions,” “Gaol Delivery;” Oyer and Terminer “Indictments.”*) 2. The constitution of 1821, article 4, section 13, provides for one clerk of the court of oyer and terminer in each county. Could there be two “courts of oyer and terminer” at once, the definite article *the* would not have been used.

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(*See also Laws of 1847, ch. 307.*) 3. Suppose that these two courts had commenced their sittings on the same day, at which of the two is the sheriff to attend and produce his prisoners? To which court are "all coroners, magistrates, &c., to produce inquisitions, recognizances, &c., "that the court may proceed thereon?" (2 *R. S.* 379, § 23.) To which court shall indictments found in the sessions be sent for trial? (2 *R. S.* 378, § 15.) And which shall claim the presence of the district-attorney of the county to prosecute? Which court should appoint to fill a vacancy in the office of district-attorney, should there be one? (*See 2 R. S.* 380, § 30; *Laws of 1847, ch. 470, § 33.*) 4. An examination of the various statutes respecting courts of oyer and terminer in this State renders it certain (if it was ever doubtful) that there can exist at the same time, in one county, but one court of oyer and terminer. 5. The legislature, at its last session, passed an act authorizing a grand jury to be sworn in the court of general sessions of the peace in and for the city and county of New York, notwithstanding there was one in existence in the court of oyer and terminer. Before this act, it was unlawful to have two grand juries at once in one county at all, and this act does not authorize two, at once, in the same court, viz., the court of oyer and terminer. For these reasons, it sufficiently appears that the first mentioned court and the grand jury by it impaneled, being the court of oyer and terminer for the county of New York, had jurisdiction of the offense, and that the second grand jury impaneled by Justice INGRAHAM's court were illegally impaneled, and had no power to present the plaintiff in error, while the other was not yet discharged. 6. The court below erred in refusing to charge the triors, that the juror, McDowell, was incompetent. The exception to the ruling is well taken. McDowell was sworn upon the jury, was challenged to the favor, and testified that he had formed an opinion that the character of the plaintiff in error was

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bad. In respect to whether the juror was "biased," he said he was. His (the juror's) language was, "I am biased." There was no other evidence before the triors than that of the juror, as to whether he was biased or indifferent. It appears positively and unequivocally, upon the undisputed evidence, that the juror was "biased;" in other words, not indifferent, and the court should have charged that the juror was not competent. If, on a trial of an issue of fact before a jury, the evidence be all one way, there being no conflict of testimony—if one side of the issue is thus proved, there being no evidence to the contrary—it is the duty of the court, on request of counsel, to so charge, and a refusal to do so is error. The same is equally true in respect to an issue before triors. In the language of the Supreme Court, per Beardsley, J., in *The People v. Bodine*, (1 Denio, 305:) "The question for the triors is, whether the juror is, as he assuredly should be, altogether indifferent, (that is, altogether unbiased;) and if they find he is not, it is their duty to reject him." In the case at bar the juror, McDowell, testified that he was not indifferent; he was biased; and there was no evidence to the contrary. The juror did not testify a word even tending to show that he was indifferent or unbiased. He did not testify that he thought he could counteract the effect of the "bias" on his mind. The juror testified to only two things, namely, that he believed that Allen's character was bad, and he (the juror) was "biased;" nothing else appeared from the juror's evidence. This state of mind is precisely that which the law adjudges to be a disqualification, which renders the juror incompetent. The judge below charged the triors that the question for them was, whether the juror was "sufficiently unbiased to act as a fair and impartial juror in the trial of this case." This was excepted to. It was error for the court below to charge the triors, that it was for them to say, on the evidence, whether they could find that the juror was "suffi-

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ciently unbiased," when there was no evidence tending in the remotest degree to prove that he was "unbiased." The court below proceeded on the idea that the only question for the triors was, whether the juror was indifferent or unbiased with respect to the issue about to be tried, on the plea of not guilty to the indictment for larceny. In the case of *Freeman v. The People*, (4 Denio, 9,) the Supreme Court held that a juror to be competent, must not only be indifferent as to the issue he is to determine, but impartial between the parties; and where triors of a challenge to the favor were sworn to find whether the juror was indifferent "upon the issue joined," this was held to be error, for the reason that that was not the issue the triors were to pass upon, but the issue for them was, whether the juror was indifferent, unbiased. In delivering the opinion of the court, Beardsley, J., says: "It is not enough that they (the triors) are indifferent upon the particular issue to be tried, but actual and thorough impartiality in regard to the parties is required; for no one who labors under prejudice, malice, or ill will towards another, can be in a fit frame of mind to act impartially, when his rights are in question." If "prejudice," as above stated, be sufficient to disqualify a juror, certainly where the testimony shows the juror believes that the prisoner's character is bad, and he (the juror) is "biased" and not indifferent, and there is no evidence to the contrary, the juror is unquestionably incompetent, and the refusal to so charge triors is error.

II. Inasmuch as the ruling in regard to the juror, McDowell, was not only in direct violation of the doctrine adjudged to be the law in *Bodine v. The People*, and *Freeman v. The People*, cited above, but contrary to the whole current of authority on the subject of challenges to the favor, the judgment of the court below should be reversed, and a new trial ordered.

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S. B. Garvin, (dist. att'y,) for the people.

I. The objections and exceptions taken to the rulings made by the court upon the challenges to the juror, McDowell, were properly overruled. It is clearly settled, upon authority, that the decision of the triors is final, upon the question of fact. (*The People v. Bodine*, 1 *Denio*, 308, 309.) Such decision is final, and cannot be reviewed. (22 *N. Y. Rep.* 151.) The only question presented on this part of the case arises upon the charge to the triors. The prisoner asked the court to charge the triors, as a matter of law, that the juror having stated he had formed a bad opinion of the prisoner's general character, he is incompetent as a juror. Which was declined, and exception taken. The charge was right. As to whether he is sufficiently unbiased to act as a fair and impartial juror in the trial of this case, the facts disclosed are, 1st. He had formed no opinion as to prisoner's guilt or innocence. 2d. He had not heard anything as to prisoner's character. 3d. Had simply formed an opinion as to his general character, which opinion was that his general character was bad. 4th. The trial he had heard left no bias on his mind against him. 5th. "I am biased." These are all the facts which appear upon the challenges, so far as is shown by the bill of exceptions. The general rule is that the juror should be indifferent between the parties. If either party think he is not indifferent, the juror may be challenged for principal cause, or to the favor, according to the degree of probability of being biased; or both challenges may be interposed. The causes of favor (says Lord Coke) are infinite, and where that which is alleged does not, in judgment of law, amount to a disqualifying bias, (1 *Denio*, 305,) it must be left to the conscience and discretion of the triors, upon the hearing of the evidence. (1 *Cowen*, 439, note. 1 *Denio*, 305.) Upon the challenge the juror may be examined, but his opinion upon the character and extent of his bias is by no means conclusive upon the triors. (1 *Com-*

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stock, 379.) ' 2. The triors are the exclusive judges of the weight to be attached to the evidence on the question of favor. (*Smith v. Floyd*, 18 Barb. 522.) 3. The challenging party is not entitled to an instruction from the judge, that the evidence shows that the juror is not indifferent. (4 Denio, 9-35.)

II. The objection taken to the organization of the grand jury is untenable, for the following reasons: It was in the nature of a plea in abatement, and was therefore too late. (1 Bishop's Cr. Law, 416.) The accused had plead not guilty, and therefore waived all matter in abatement. (1 Colby's Cr. Law, 285. *McMillan v. State*, 8 Sme. & Mar. 587.) 2. There was no proof, by affidavit or otherwise, by the prisoner, to show the truth of the plea presented. (2 R. S. 731, § 75. 1 Colby's Cr. Law, 271.) Under a plea of not guilty, the prisoner can only give in evidence whatever negatives the allegations in the indictment or complaint. (*The People v. Benjamin*, 2 Parker, 201.) After plea of not guilty and a partial trial, it is too late to object to the mode in which the grand jury were organized. (*The People v. Griffin*, 2 Barb. 427.)

The judgment should be affirmed.

GEO. G. BARNARD, J. The prisoner was tried and convicted, in the general sessions, of grand larceny.

In the impanneling of the jury one of them was asked "if he had formed an opinion as to the general character of the prisoner." He replied that he had; that "his general character was bad." Again, "that he was biased." Those admissions rendered the juror incompetent. The prisoner was entitled to a fair trial, before an impartial jury. If one of the jury was prejudiced against him it can hardly be said that he had an impartial trial; or, if he was of opinion that the prisoner's character was bad, that the latter had an impartial jury. The presumption is that a man is innocent, until found guilty.

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In this case the juror had formed an opinion that the prisoner was guilty, and he required evidence to remove that presumption. When objected to, he should have been set aside and his place supplied with one who was not "biased," or who thought the prisoner's "character bad."

The juror was not unbiased. (*People v. Bodine*, 1 *Denio*, 305. *People v. Freeman*, 4 *id.* 9.)

For these reasons the conviction should be set aside, and a new trial ordered.

CARDOZO, J. Concurring in the opinion of Justice Barnard, it is not necessary for me to give my views upon the other question to which Judge Ingraham refers. I only wish to say that the opinion of Justice Strong, in *Lohman's case*, in the Supreme Court, cited by Judge Ingraham on the point discussed by Judge Barnard, cannot be regarded as authority. That case went to the Court of Appeals, (1 *Comst.* 380,) and Judge Gardiner, speaking of the question put to the juror after he had declared his belief that the prisoner's general character was bad, as to whether he could render a verdict on the evidence, says: "The issue to be tried was whether the juror stood indifferent between the parties. This of course depended upon his state of mind. To ascertain this was the object of the examination of both parties. Upon an issue of this kind, from the nature of the fact to be established, the opinion of the juror, derived from his own consciousness, was relevant, competent and primary evidence. If the juror answered in the affirmative, it would have been a declaration that he possessed such ability. That would be but an opinion, but one founded on his own consciousness, and so far entitled to the consideration of the triors, although by no means conclusive upon them. If he had responded in the negative, the answer would, if believed, *have been decisive against his competency*. For although a man may think himself impartial when he is not, *he cannot be a competent*

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juror if conscious of an inability to render a verdict without being influenced by previous impressions."

Here the district attorney chose to let the matter stand upon the juror's evidence that he had "formed an opinion that the prisoner's character was bad; that he was biased;" without any inquiry as to whether he could disregard that feeling and render a verdict solely upon the testimony. And that being so, I think, upon the evidence as it closed, the juror's answers, in the language of Judge Gardiner, were "decisive against his competency;" and that the prisoner was entitled to have such an instruction given to the triors.

It would be absurd to say that a man is entitled to have an "indifferent" jury, if it may be constituted of persons who have formed an opinion against his general character, and are already "biased" against him before the trial commences.

The conviction should be reversed.

INGRAHAM, P. J., (dissenting.) The ground of objection, in this case, as to the juror McDowell, is that he was incompetent, because he had formed an opinion as to the character of the prisoner, and said he was on that account biased.

The juror was challenged to favor. The prisoner's counsel requested the court to charge the triors, as matters of law, that the juror having stated he had formed a bad opinion of the prisoner's general character, he was incompetent. This was refused, and the question was submitted to the triors, who found him to be competent.

I am of the opinion that on a challenge to the favor, the court should not instruct the triors as requested by the prisoner's counsel. It is the duty of the court to submit the question to the triors, and if that is done, they are to pass upon the question whether the challenge was sustained. It by no means follows that be-

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cause a juror was impressed with a belief of the bad character of the prisoner, he was incompetent to try the question of guilt or innocence. In *Freeman v. The People*, (4 Denio, 35,) whether a juror was disqualified by the bias he had as to the character of the prisoner, was held to be a question of fact, to be disposed of by the triors. It would not have been sufficient on a challenge for principal cause. And the court say: "It is not a question to be solved by a rule of law, but by the common sense of the triors; and if this has fair play, the difficulty will rarely be found very great. The triors must find that the juror stands impartial and indifferent, or they should reject him. It is the province of the court to say what evidence is admissible on this question of indifference, but its strength and influence in establishing the allegation of favor or bias are for the triors alone to determine."

In this case the court also say: "The instruction should have been that this was evidence to be considered by them, and if it convinced them that actual bias existed, the juror ought to be excluded."

In *Costigan v. Cuyler* (21 N. Y. Rep. 134) it was held that the decision of the triors upon the evidence would have been final.

In *Dauchy v. The People*, (22 N. Y. Rep. 147,) Welles, J., says: "It is clearly settled by authority that the decision of the triors is final upon the question of fact whether the juror stands indifferent, which is in all cases the question to be decided by the triors. The decision of the court, in admitting or rejecting evidence, is subject to exception. The triors are to receive such evidence as may be laid before them, and a bill of exceptions will not lie to correct any error in their finding."

In *O'Brien v. The People* (2 Abb. N. S. 368, 372) it is said: "The challenge was for favor, the decision of which, as a question of fact, was final."

In *Smith v. Floyd* (18 Barb. 522) the juror challenged to

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the favor was examined, and testified that he had formed an opinion as to a custom in a town which formed the subject of the action. The counsel requested the court to charge the triors that the testimony showed the juror not indifferent. This was refused, and an exception taken. The judge says, "this was not a question of law upon which the defendant was entitled to have the instruction of the court, but it was to be referred to the intelligence and good sense of the triors."

And in *The People v. Lohman*, (2 Barb. 216,) where the juror, on a challenge to favor, stated he had an opinion unfavorable to the prisoner as to general character, but the triors found against the challenge, Strong, P. J., says: "It is not in general sufficient to justify the triors in setting aside a juror as not indifferent, that he has formed an unfavorable opinion of the character of the accused. If it should be, notorious offenders could not be tried at all."

My conclusion upon this question is that upon a challenge to the favor, the court must decide as to the admission of evidence to the triors, and any error in this respect may be corrected by exception, but upon the facts the court has no right to decide either that the evidence is sufficient or insufficient to sustain the challenge; but that the duty of the court is to submit all the facts to the triors, who alone are to decide whether or not the challenge should be sustained.

The objection as to the courts of oyer and terminer is not well taken. Whatever objection there may have been, under the English system, the provision of the Code has relieved the difficulty. The 20th section directs that the courts of oyer and terminer shall be held twice annually, in every county, and as many more terms as the judges shall appoint. The 23d section provides for extra courts to be appointed by the governor, and the 24th section provides for the adjournment of any court to a future time.

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The holding of one branch of the court does not prevent the holding of the regular courts as directed by the statute.

Besides, the objection should have been taken before pleading to the merits. It is not available under the plea of not guilty.

I think the judgment should be affirmed.

New trial granted.

[FIRST DEPARTMENT, GENERAL TERM, June 6, 1870. *Ingraham, P. J.*, and *Cardozo* and *Geo. G. Barnard*, Justices.]

CHARLES PHILLIPS, plaintiff in error, *vs.* THE PEOPLE,
defendants in error.

It is not a valid objection to a writ of error to remove a case from a court of sessions, that it does not require a return of the *judgment* below, or a return of the proceedings on the indictment "*if judgment be thereupon given.*" Nor is it a ground of objection to the hearing of the case, in the Supreme Court, upon the writ of error, that there is no return of any record of judgment.

It is sufficient if the writ, in terms, commands that the record and proceedings (which include the judgment, if any be given,) be certified to the Supreme Court, and the answer of the court of sessions sets forth the indictment, the trial, the exceptions, the findings of the jury, and the judgment of the court thereon.

A declaration or admission, if made before the accused is conscious of being charged with, or suspected of, crime, is admissible in evidence under all circumstances, however made or obtained; under oath, or without, upon a judicial proceeding or otherwise. But if made afterwards, the law at once becomes cautious and hesitating. The true inquiry then is, was it voluntary? For, unless it is *entirely* voluntary, it is held to be not admissible.

Per POTTER, J.

By *voluntary* is meant, proceeding from the spontaneous suggestion of the party's own mind, free from the influence of any extraneous disturbing cause.

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Where the accused, while under arrest for stealing a horse, was told by the complainant, and again, in substance, by the officer, that "*the best he (the accused) could do was to own it up ; that this would be better for him ;*" Held that a confession made under this inducement of advantage, if he confessed, was not a *voluntary* confession.

On the trial of an indictment for stealing a horse, it is not erroneous to admit evidence of the accused taking a wagon, on the same night, from another person. The taking of a wagon to use with the stolen horse, if they were used together, is a corroborating circumstance to the main charge, and can be used as evidence for that purpose ; notwithstanding it is proof of another felony, also, not charged in the indictment.

WRIT of error to the court of sessions of Saratoga county, to bring before this court for review the trial and conviction of the plaintiff in error, upon an indictment for grand larceny.

The writ did not, in terms, require any return of the *judgment* ; nor did it in the usual form require a return of all proceedings on the indictment "*if judgment be thereupon given.*" Nor did the county clerk's return to the writ contain the *record of the judgment of the court*.

On the trial various exceptions were taken by the prisoner's counsel to the admission and rejection of evidence ; among others to the admission of evidence of the confessions of the prisoner. The prisoner's counsel also made several requests to the court to charge the jury, which were denied, and exception taken.

J. W. Hill, for the plaintiff in error.

I. The confessions proven were not voluntary, and were not, therefore, admissible. (*People v. McMahon*, 15 *N. Y. Rep.* 384. *Cowen & Hill's Notes, Phil. Ev.*, n. 206, p. 235. *People v. Ward*, 15 *Wend.* 231.) And they could not be made proper by being part of the conversation. (*People v. Wentz*, 37 *N. Y. Rep.* 310.)

II. The evidence of taking of wagon was a distinct offense not alleged in the indictment, nor so connected with the taking of the horse as to be a part of it, or neces-

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sary to characterize it, and was therefore inadmissible. (*The People v. Wentz*, 37 N. Y. Rep. 307, 310. *Cowen & Hill's Notes, Phil. Ev.*, n. 347, p. 462.)

III. The judge erred in charging that if it was the purpose of the prisoner to appropriate the horse to his own use, and to deprive the owner of the use of it, he was guilty of a larceny. That on this point it was proper for them to consider the manner in which the barn door was opened, the course taken by the prisoner to conceal his movements from the observation of the inmates of the complainant's house, the hour at which the transaction took place, his success in eluding detection, the distance that he removed the horse from the premises of the owner, the use he made of him, and his subsequent denial of all participation in the taking of the horse. That these acts and circumstances characterized the purpose of the prisoner in taking and carrying away the horse. That the taking and carrying away property, under the circumstances referred to, constituted a larceny, and not a mere trespass; that the circumstances of the taking in this case were such as constituted a larceny, if the acts were committed by a man that knew right from wrong. The intention was matter for the jury, and the circumstances of this case raised a fair question upon intent. The judge assumed to take the question of law and fact from the jury. (1 *Leach*, 418. 2 *East's P. C.* 685. 1 *Hale*, 504. *Barb. Crim. Law*, 175.) The same error was committed by the judge in refusing to charge, as requested, that if the jury believed that the prisoner took the horse solely for the purpose of driving it to Chatham street, then they might acquit. Clearly, if the party took the horse solely to ride to Chatham, and there abandoned it, and did not convert it further to his own use, it was only trespass. In 2 *East's P. C.* 557, the prisoner took a horse and rode it thirty-two miles, and left it at an inn, and pursued his journey; held only trespass. So, in 1 *Car. & P.* 658, where a man took

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a horse more conveniently to get off goods stolen, but for this purpose only, and not with intent to finally convert it to his own use. So, also, in the familiar case of a slave taking a horse to aid his escape. (*Barb. Crim. Law*, 174. *People v. Wentz, supra.*) In the teeth of every principle of law was the refusal to charge as requested, that if the jury believed that the confessions, or any of them, proven to have been made by the prisoner after his arrest, were not entirely voluntary, proceeding from the spontaneous suggestions of his own mind, far from the influence of any disturbing cause, then such confessions, or any of them not so voluntarily made, were to be disregarded by the jury. The rejection of improper testimony is approved in *Durgin v. Ireland*, (4 *Kern.* 322.)

W. B. French, (district attorney,) for the people.

The judgment of the Supreme Court should be reversed, and that of the court of sessions affirmed.

I. The writ of error should be quashed or set aside. 1st. It is not in the usual or proper form. It should either require the return of the judgment below, or a return of the proceedings on the indictment "if judgment be thereupon given." (*See form of writ in Lowenberg v. The People*, 5 *Park.* 415. *Coats v. The People*, 4 *id.* 663. *Peverelly v. Same*, 3 *id.* 59.) 2d. But if not fatally defective in that respect, yet the writ should be quashed or set aside, or the conviction affirmed, for the reason that there is no return of any record of judgment in the case; and for aught that appears in the return, none has ever been made up. This is a fatal defect in the return, and no review of the trial can be had on this writ, and the return thereto. (2 *R. S.* 763, § 4; 765, § 20. *Thompson v. The People*, 3 *Park.* 208. *Dawson v. The same*, 5 *id.* 118. *Weed v. The People*, 31 *N. Y. Rep.* 465. *Chamberlin v. Morey*, 19 *Wend.* 350.)

II. But the judgment is right upon the merits, and

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ought to be affirmed. 1st. The court did not err in denying the request of the prisoner's counsel to be permitted to ask the witness Welch if he did not say, in substance, to the prisoner that he "had better own up, for it would be better for him." The district-attorney did not at that time propose, nor did he in fact prove, or offer to prove by the witness, any confession of the prisoner. On the contrary, the only declarations of the prisoner, proved on the direct examination of Welch, were positive denials of any knowledge of the horse, or of his whereabouts, or of his having taken him. This proof certainly did not injure the prisoner, and had no tendency to convict him of the offense charged; and there was, therefore, no occasion for allowing the question to be put to the witness. 2d. Nor did the court err in overruling the objections to proof of the prisoner's confessions, subsequently testified to by Welch. (a.) The confessions were voluntarily made by the prisoner. The whole case negatives the idea that the prisoner was at all affected by anything said to him by Welch. But if he was affected by what Welch said to him, its only immediate effect was to make him deny the "soft impeachment" in toto. Under such circumstances, the law does not exclude the confessions of one accused of crime. (*People v. Smith*, 3 How. Pr. 227, and cases cited. *Done v. The People*, 5 Park. 364. *Duffy v. Same*, Id. 321, 323. S. C., 26 N. Y. Rep. 588.) (b.) But it was proper to overrule the objections, and to admit proof of the prisoner's confessions to Welch, because the counsel for the prisoner had laid the proper foundation for its introduction by previously proving, on the cross-examination of Welch, that the prisoner had made a different statement from the one proved by the district-attorney. After such proof it was too late for the prisoner's counsel to object to evidence rendering specific and definite the general "statement" which they had proved was made by the prisoner, differing from the one already proved. It was manifestly

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proper that the prosecution should then place before the jury the different statement so made, so that the jury might judge for themselves whether it differed or agreed with the former statement of the prisoner. If the prisoner's counsel did not want such different statement proved, he should not have proved that one was made. 3d. Nor did the court err in overruling a similar objection to evidence of the witness McNamara. For the district-attorney did not press the question, after eliciting the answer that he told the prisoner "it would be better for him to tell where the horse was, so Mr. Welch could get him." This did not do the prisoner any injury. 4th. Neither did the court err in overruling the objections to the evidence of McNamara to the prisoner's confessions, subsequently given, as they were but part of a conversation, a portion of which had already been proved by the prisoner's counsel. On cross-examination of this witness, the counsel for the prisoner had proved by him as follows: "I recollect hearing the prisoner say that he took the horse to ride down to where he worked." And the witness subsequently, on his re-examination, and again on his cross-examination, stated that it was at his stable in Schuylerville, and not in the conversation with Welch, that the prisoner said this. Now, all the confessions testified to by McNamara were made at this same conversation at the stable, a part of which the prisoner's counsel had previously proved, as already shown. It needs no authority to show that the prisoner's counsel have not an exclusive license to prove such portions of a conversation with their client as they may think favorable to the latter, and a right to object to and exclude the residue, which may possibly make against him. Unless they have such right the court committed no error in overruling the objections to the confessions proved by McNamara. 5th. But the proof by McNamara was that the substance of all that was said to the prisoner to induce him to confess, either by him or Welch, was that "if he

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had taken the horse, it would be better for him to own up," &c. Now this was no improper inducement for him to tell the truth, and none at all to induce him to own himself guilty, when he was in fact innocent. In such case the confession is admissible in evidence against the prisoner. (*People v. Smith*, 3 *How. Pr.* 227, 230, and cases cited. *Done v. The People*, 5 *Park.* 364, 390. *Duffy v. Same, Id.* 321, 323. *S. C.*, 26 *N. Y. Rep.* 588.) 6th. So also were the confessions admissible in this case, because they did not stand alone, but were corroborated. It was solely in consequence of them that the horse was found. The prisoner gave a specific description of the route he took, by following which he told Welch he would find his horse. Welch followed the directions, and found his property. Under such circumstances the confessions of a prisoner are admissible against him. (*Done v. The People*, 5 *Park.* 364, 390. *The People v. McMahon*, 15 *N. Y. Rep.* 386. *Duffy v. The People*, 5 *Park.* 321. *S. C.*, 26 *N. Y. Rep.* 588.) 7th. It was also competent, after properly proving the confessions of the prisoner that he took the horse, to prove also that after the magistrate read over the complaint to him, the prisoner pleaded guilty to the charge. 8th. The court were right in sustaining the objections to and excluding the question put to Welch, "Is the prisoner above or below the ordinary intellect of mankind?" Unless the object was to prove the prisoner *non compos mentis*, which was not pretended, the evidence was inadmissible. (*Patterson v. The People*, 46 *Barb.* 626. *Gardiner v. Same*, 6 *Park.* 157.) But evidence of the same character was subsequently admitted, and its force entirely avoided by the proof by the prisoner, from his own witness, that he knew "right from wrong."

III. The judge did not err in his charge to, or refusal to charge the jury. 1st. In charging that the circumstances of the taking in this case are such as constitute larceny, if they were committed by a man that knew right

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from wrong. (*Duffy v. The People*, 26 N. Y. Rep. 588, 595. S. C., 5 Park. 321. *Patterson v. The People*, 46 Barb. 626.)

2. In charging that it was for the jury to determine whether the confessions were made under such circumstances as were calculated to induce the prisoner to make a false confession or statement; and also whether such confessions were corroborated or not. (*People v. Smith*, 3 How. Pr. 227, 230, and cases cited. *Done v. The People*, 5 Park. 364, 390. *Duffy v. The same*, Id. 331, 323. S. C., 26 N. Y. Rep. 588.) 3d. In refusing to charge that the proof of taking a wagon by the prisoner, was no proof of the commission of a larceny in taking the horse mentioned in the indictment. It is well settled that the whole of a confession relating to two larcenies is admissible on the trial of one. (1 Arch. Cr. Pr. 409.) Besides, the taking the wagon the same night by the prisoner was part and parcel of one and the same scheme, to get up a team and vehicle, with which the prisoner was conveyed to North Chatham. And it tended to characterize the motive or intent with which the act was done; all which was entirely allowable (*Osborne v. The People*, 2 Park. 583. *People v. Wood*, 3 id. 681.) 3. The charge of the judge was right, and covered the entire case, and the multitudinous requests of the prisoner's counsel were either sufficiently covered by the charge as given, or were properly refused.

IV. The judgment should be affirmed, or the writ of error quashed.

By the Court, POTTER, J. An objection is taken by the counsel for the people to the hearing of this case, on the ground, first, that the writ of error is not in the proper form. That it should require the return of the *judgment* below, or a return of the proceedings on the indictment, if *judgment be thereupon given*. And, second, that there is no return of any record of judgment, in the case. He

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claims, for this reason, that the writ should be quashed or set aside, and the conviction affirmed.

These objections are technical, and are without force. There is no prescribed form of a writ of error in such case by statute, and the books of forms have furnished no unvarying precedent. A form precisely like that used in this case was adopted to remove a case from the Supreme Court to the Court of Appeals, in *The People v. Thoms*, reported in 3 *Parker's Crim. Rep.* 256, and is cited as a proper form in *Waterman's notes to Archbold's Criminal Practice*, (vol. 1, p. 719,) to which no objection was taken. And also in a new work on criminal law and forms, by *Colby*, (at p. 409,) to remove a case from a court of sessions to the Supreme Court, the same form was adopted as in this. Besides, the writ, in terms, does command that the record and proceedings (which include the judgment, if any be given,) be certified to this court, and the answer of the court of sessions does set forth the indictment, the trial, the exceptions, and the findings of the jury and the judgment of the court thereon. All that is complained of is fully before the court for review.

The plaintiff in error raises the objection that his declarations, or confession of guilt, admitted in evidence, though objected to, were not legally admissible, inasmuch as they were not voluntary. This I regard as the important point in the case. The complainant, Dudley Welch, residing in the town of Saratoga, lost a horse from his stable on the night of the 26th September, 1868; the stable door was opened by force, and the horse taken without the consent of the owner. About three months afterwards he found the horse at North Chatham, Columbia county, about thirty miles from Troy. The plaintiff in error was arrested on suspicion of being the person who took the horse, and the complainant was his uncle. On being arrested, the complainant, in the presence of the officer who held him in custody, attempted to learn from the plaintiff in error

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where the horse was, and to get admissions from the prisoner as to his taking the horse. The prisoner at first denied all knowledge of the horse, and denied having taken him. The complainant then detailed to him certain circumstances which could be proved, tending to show his guilt. The complainant then told him, (prisoner,) in presence of the officer in whose custody he was, "*that the best he (prisoner) could do, was to own it up; that this would be better for him.*" This statement was also repeated to him by the officer who held him in charge. After these statements, made by the complainant and officer, the prisoner began to give information of his manner of taking the horse, and the place to which he took him; and then directed the complainant what roads to take, and the place where he would find the horse. The complainant followed these directions, and found his horse. On the trial, while the complainant was testifying to the conversation at the time of the arrest, the prisoner's counsel asked the court to be permitted to ask the witness if, at the time of and prior to this conversation, the prisoner was not under arrest charged with this crime, and if he did not say in substance to prisoner, "that he had better own up, for it would be better for him," which request was denied, and the prisoner's counsel duly excepted. The same objection was made to the testimony of McNamara, the officer who arrested the prisoner, while he was testifying; and a like ruling by the court. This officer then testified that before the prisoner made any confessions, and while he was under arrest, he said to him in substance, that it would be better for him to confess the matter, and told him the same afterwards, before he was taken before the magistrate. The prisoner's counsel then moved the court to strike out all the testimony and confessions made by the prisoner, upon the ground that they were not *voluntary*, and were improper, which the court denied, and the prisoner's counsel excepted. Although the officer afterwards somewhat

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varied the language he used to the prisoner, yet he then states it as the substance of what he said; "*if he had taken the horse it would be better for him to own up,*" and yet, he also adds, that he again told him, that he "*thought the complainant would not be so hard on him if he could get his horse back.*" This fully presents the point, as to whether this confession was voluntary. The rule seems to be well settled. Nothing remains but to make the application.

If the declaration or admission is made before the accused is conscious of being charged with, or suspected of crime, they are admissible under all circumstances, however made or obtained; under oath, or without, upon a judicial proceeding, or otherwise. But if made afterwards, the law at once becomes cautious and hesitating. The true inquiry then is, was it voluntary? For unless it is *entirely* voluntary, it is held to be not admissible. This is the rule as collected from all the authorities, and as laid down in the Court of Appeals, by Selden, J., in the case of *The People v. McMahon*, (15 N. Y. Rep. 384.) This opinion, so tersely and clearly expressed, is so exactly to the point, that I have extracted from it. He says: "In order to apply this rule, it is necessary to know what is meant by the term *voluntary*. The word is evidently not in all cases used in contradistinction to *compulsory*, because a confession obtained by either threats or promises from any one having authority over the accused, or concerned in the administration of justice, is uniformly held to be inadmissible. However slight the threat, or small the inducement thus held out, the statement will be excluded as not voluntary." It is plain, therefore, that in such cases, at least, by *voluntary*, is meant proceeding from the spontaneous suggestion of the party's own mind, free from the influence of any extraneous disturbing cause. This was repeated in *The People v. Wentz*, (37 N. Y. Rep. 304.) After citing various cases supporting these propositions,

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the learned judge says: "No dictum to the contrary can be found."

Applying that principle to this case, it will be seen that the accused, a weak minded man, was, at the time of the declarations proved, under arrest, in the custody of an officer; the accuser his uncle; his custodian an officer concerned in the administration of justice; the accused naturally acting under an agitation of mind, was promised advantage if he confessed. It seems to me that this was a case clearly within the principle of the cases cited above, *not a voluntary confession*. Some inducement was held out, some extraneous influences did prevent the admission from being the spontaneous suggestions of his own mind, from such influences. If I am right in this, there was error committed on the trial. It is of no importance for us to see that there was *probably* other sufficient evidence in the case to have convicted the accused. I think there was. I have no doubt of his guilt, myself; but this was a question for the jury, not for us. He was entitled to a trial by the settled rules of law; a material error was committed against him; this entitles him to a reversal of the judgment.

There are two other complaints made of error. If they are such, they are not so clearly so as the one I have noticed. The admission of evidence of the accused taking a wagon on the same night from another person, is charged as error. I do not think, under the circumstances, that this was error. The taking a wagon to use with the stolen horse, if they were used together, was evidence of a corroborating circumstance to the main charge, and could be used as evidence for that purpose, notwithstanding it was proof of another felony also, not charged in the indictment; and yet, there may be a case of another distinct felony committed at another time, and under other circumstances, which it would be error to admit in proof.

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The refusal of the learned judge to charge propositions, considered abstractly, would seem to be erroneous, but they must be regarded as based upon what had been proved in the case; and the refusal to charge as requested, was refused on the ground of having no basis in the evidence that authorized the requests made. One or two of the requests to charge, was, that the confessions of the prisoner, under the circumstances, were not voluntary. This, also, the judge refused; and if we are right in the first point we have reviewed, this was also error. I am therefore of opinion that the judgment of the court of sessions should be reversed.

Judgment reversed and prisoner discharged, absolutely. (a)

[WARREN GENERAL TERM, July 13, 1869. *Rosekrans, Potter and Bockes, Justices.*]

(a) On writ of error on behalf of the people, the Court of Appeals, at its April term, 1870, made the following order in this case: "So much of the judgment of the Supreme Court as reversed the judgment of the court of sessions affirmed; and that portion of the judgment granting an absolute discharge modified, by ordering a new trial in the sessions."

NELSON M. KNICKERBOCKER, plaintiff in error, vs. THE PEOPLE, defendants in error.

Although it is a sound proposition that mere possession, by a person, of stolen goods taken on the occasion of a burglary—that is, possession alone, without any other facts indicative of guilt—is not *prima facie* evidence that such person committed the burglary; yet where the prisoner was shown to have been in the vicinity of the burglary, just prior to the act, and to have left there under circumstances of some suspicion; and the evidence tended to show that he was, soon thereafter, in possession of some of the property taken from the safe at the time of the burglary; and further, that he prevaricated in regard to it, and made a false statement of the manner in which it came to his possession; *Held* that in this condition of the case, possession

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of the stolen property by the prisoner, unexplained, was *prima facie* evidence on which to convict him of burglary.

Held, also, that a request to charge the jury that the mere possession, by the prisoner, of the stolen property, was not *prima facie* evidence of the commission of the burglary by him, was properly refused; inasmuch as the case was not one of mere possession by the prisoner of the stolen property, but it contained other proof indicative of guilt.

Where the court refused to charge the jury that the mere possession of stolen property was not *prima facie* evidence of the commission of the burglary by the prisoner, but on exception being taken, immediately added, "I will charge this way; that the possession of stolen property immediately after the commission of the offense is *prima facie* evidence of guilt; in other words, the accused is called upon to explain how the property came to his possession;" *Held* that the judge might be regarded as qualifying his ruling on the request to charge, by the explanation or substituted instruction, so far as it differed from the request; and that to the charge in this form there was no valid objection, considered with reference to the state of the case, on the proof.

THIS is a writ of error to the court of sessions of Saratoga county, to bring before the court for review the trial and conviction of the plaintiff in error, on an indictment for burglary and larceny.

A new trial was sought on account of alleged errors of law, committed by the judge in excluding evidence, and in charging the jury, and refusing to charge them as requested by the counsel for the prisoner. No direct evidence of the breaking and entering by the prisoner was given. The counsel for the prisoner requested the court to charge that "the mere possession of stolen property is not *prima facie* evidence of the commission of burglary by the prisoner." This the court refused, and the prisoner's counsel excepted. The judge thereupon remarked: "I will charge this way; that the possession of stolen property immediately after the commission of the offense, is *prima facie* evidence of guilt. In other words, the accused is called upon to explain how the property came to his possession." To this portion of the charge the prisoner's counsel excepted.

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The jury found the prisoner guilty of burglary in the third degree.

Charles S. Lester, for the plaintiff in error.

I. Burglary and larceny are two distinct crimes, requiring different characters of evidence. Breaking and entering with intent to commit a crime are the essential ingredients of burglary, and these must be proved by the prosecution. (*Roscoe's Crim. Ev.* 340.) Burglary is a higher crime than larceny, but the prisoner may be convicted of the lesser offense. (*People v. Wood*, 2 *Park. Cr. Rep.* 22.) *Prima facie* evidence is such as entitles the party giving it to judgment, in case it is not disproved. It means, standing alone, sufficient evidence. Now the possession of stolen property is not sufficient evidence of breaking and entering, although it may be of the felonious intent. This has been frequently decided. (*People v. Frazier*, 2 *Wheeler's Crim. Cases*, 55. *Jones v. The People*, 6 *Park. Crim. Rep.* 126. *Davis v. The People*, 1 *id.* 447.) Mere possession of stolen goods is not *prima facie* evidence of guilt of any crime. "It will," says Greenleaf, "be necessary for the prosecution to add the proof of other circumstances indicative of guilt, in order to render the naked possession of the thing available towards a conviction." (3 *Greenl. on Ev.* § 31.)

II. The subsequent remark of the judge did not cure the error. The prisoner gave evidence tending to show his absence from the place where the burglary was committed at the time of its occurrence. He gave evidence tending to explain his possession of the property claimed to have been stolen.

The question to which the attention of the judge and jury was called was, that possession of stolen property was not *prima facie* evidence of burglary, and his refusal to charge thus was in fact instructing the jury that the converse of this proposition was true; and if his statement

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means anything, it is that "the possession of stolen property immediately after the commission of the offense is *prima facie* evidence of guilt" of the crime of burglary, which is manifestly error.

The conviction and sentence by the sessions should be reversed.

W. B. French, (district attorney,) for the people.

The judge did not err in charging or refusing to charge the jury. (1.) In refusing to charge, as requested by the prisoner's counsel, "that the mere possession of stolen property is not *prima facie* evidence of the commission of the burglary by the prisoner." There is nothing in the case to warrant such a request. The evidence tended to show, not the mere possession of the stolen property, but the exclusive possession, and that he gave a false account of the manner in which he came by it. Indeed the whole evidence of the case, the testimony of every witness sworn on the trial in behalf of the people, and the prisoner's own evidence, show a state of facts and circumstances, besides the fact of the property being found in his exclusive possession, that coil around the prisoner, and point him out as the man who committed the crime, with a certainty beyond contradiction. The request, therefore, was simply an abstract proposition, and the judge was at liberty to refuse to charge as requested, even though the proposition were in fact correct. (*Kiernan v. Rocheleau*, 6 Bosw. 148. *Doughty v. Hope*, 1 Comst. 79. *Rushmore v. Hall*, 12 Abb. 420.) (2.) Nor did the judge err in charging the jury. Our courts hold, it is true, that "the mere possession of stolen property, without any other evidence of guilt, ought not to be regarded as *prima facie* or presumptive evidence of the burglary." But that state of facts does not arise in this case. Here the property was traced to the exclusive possession of the defendant; and the whole evidence evolves a net work of facts and circum-

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stances that can not be gainsayed, nor got rid of by the prisoner, and out of which his own evidence could not help him; but, on the contrary, tied him closer, and more clearly identified him with the crime. This case, then, comes directly within the opinion of Judge Johnson in *Davis v. The People*, (1 *Park.* 451, 452:) “In a case where goods have been taken by means of a burglary, and they are immediately or soon thereafter found in the actual and exclusive possession of a person who gives a false account, or refuses to give any account, of the manner in which he came into the possession of them, proof of such possession and guilty conduct is presumptive evidence not only that he stole the goods, but that he made use of the means by which access to them was obtained.” The indictment here was for burglary and larceny, and it was competent to convict the prisoner either of simple larceny, or of burglary and larceny. “It never was doubted that on a trial for larceny, after the *corpus delicti* was proved, and evidence given that the stolen goods were found in the possession of the accused, such possession, unexplained, was *prima facie* evidence that the person in whose possession they were so found was the person who committed the larceny. The charge went no further than that.” (*Opin. by Welles, J., in Jones v. The People*, 6 *Park.* 128.) The judge’s charge in this case was directly within this rule, that “the possession of stolen property immediately after the commission of the offense is *prima facie* evidence of guilt.”

This court should affirm the judgment of the court of sessions, and direct the sentence pronounced to be executed.

By the Court, BOCKES, J. This case comes before the court on writ of error to the Saratoga sessions. The plaintiff in error was indicted for burglary and larceny, and was

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tried and convicted in the court of sessions of Saratoga county, of burglary in the third degree. Judgment was thereupon pronounced that he be imprisoned in the state prison for the period of five years.

It appears from the record that the trial was quite protracted, occupying several days; but no more of the evidence is returned than was deemed necessary to present the questions raised on the exceptions taken by the counsel for the prisoner, and here urged upon our consideration. The evidence certified to us is very brief—not being given in full. It must be inferred that there was sufficient to sustain the conviction, except in so far as it may be affected by the exceptions appearing on the record.

On the trial it was proved that on the night of the 21st of October, 1867, the jeweler's store of one Henry L. West, in the village of Ballston Spa, was burglariously entered, the iron safe broken open, and watches and jewelry of the value of \$2000 feloniously taken therefrom. With a view to charge the crime upon the prisoner, it was proved that he was familiar with the store and property, having previously worked for West at his trade as a jeweler; that he was present the evening prior to the burglary when the valuables were placed in the safe and the store was closed; that he was invited to remain with West over night, it being very dark, but he refused, and left West about 9½ o'clock, stating that he was going to his mother's, where he then resided, a distance of about five miles. Evidence was also given proving, or tending to prove, that he was in possession of some of the stolen property soon after the burglary, and that when interrogated in regard to it he prevaricated and falsified. The evidence is not before us in detail, but the record states, in general terms, that testimony was given tending to identify the property, which was traced to the exclusive possession of the prisoner, as that which belonged to West, and was in his safe at the time of the burglary; also tending to show that the pris-

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oner gave a false account of the manner in which he came to its possession. On the part of the prisoner there was evidence given tending to prove that on the night of the burglary he was at his mother's residence and in the bedroom with his brother, from about eleven o'clock in the evening until the next morning. In this condition of the case, the prisoner's counsel requested the court to charge the jury that the mere possession of stolen property was not *prima facie* evidence of the commission of the burglary by the prisoner. The court refused so to charge, and the prisoner's counsel excepted. The judge immediately thereupon remarked, "I will charge this way; that the possession of stolen property immediately after the commission of the offense is *prima facie* evidence of guilt. In other words, the accused is called upon to explain how the property came to his possession." To this portion of the charge the prisoner's counsel excepted.

The exceptions to the rulings above stated present the only question of importance, if not the sole question, in the case.

It is undoubtedly a sound proposition that mere possession by a person of stolen goods taken on the occasion of a burglary—that is, possession alone, without any other evidence whatever indicative of guilt—is not *prima facie* evidence that such person committed the burglary. Mere possession of stolen goods is not *prima facie* evidence of larceny even; for, as is said by Greenleaf, (3 *Greenl. on Ev.* § 31,) it is necessary to add the proof of other circumstances indicative of guilt, in order to render the naked possession of the thing available towards a conviction; such as the previous denial of the possession by the party charged, or his refusal to give any explanation of the fact, or giving false or irreconcilable accounts of the manner of its acquisition. The party may have acquired the stolen property by honest purchase, or may have found it where the thief deposited it or lost it. But we must con-

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sider the ruling on the request to charge the jury in this case in connection with the explanation which immediately followed and accompanied it; also with reference to the state of the case on the evidence. The proof that crime had been committed was complete. The prisoner was shown to have been in the vicinity of the burglary just prior to the act; and to have left there under circumstances of some, although perhaps of slight, suspicion; and the evidence tended to show that he was soon thereafter in possession of some of the property taken from the safe on the occasion of the burglary; and further, that he prevaricated in regard to it, and gave a false statement of the manner in which it came to his possession. In this condition of the case, possession of the stolen property by the prisoner, entirely unexplained, would be unquestionably *prima facie* evidence on which to convict him of larceny, according to the text above quoted from Greenleaf on Evidence. Here was the denial of the possession of the stolen property by the prisoner; or, concede its identity, which the request to charge assumes as a basis for the proposition, there was no explanation of its possession by him attempted; and he gave a false account of the manner of its acquisition. This proof, added to the fact of exclusive possession of the stolen property, made, according to Greenleaf, a *prima facie* case of guilt. (3 *Greenl. on Ev.* § 31.) But under the proof in this case, exclusive possession by the prisoner of the property taken on the occasion of the burglary, soon after that event, if conceded, would be, according to the same learned author, *prima facie* evidence on which to convict of burglary. Greenleaf says: "Possession of the fruits of crime, recently after its commission, is *prima facie* evidence of guilty possession, and if unexplained either by direct evidence or by the attending circumstances, or by the character and habits of life of the prisoner, or otherwise, it is taken as conclusive." He adds: "This rule of presumption is not con-

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fined to the case of theft, but is applied to all cases of crime, even the highest and most penal. Thus, upon an indictment for arson, proof that property, which was in the house at the time it was burnt, was soon afterwards found in the possession of the prisoner, was held to raise a probable presumption that he was present and concerned in the offense. The like presumption is raised in the case of murder accompanied by robbery." (1 *Greenl. on Ev.* § 34.) In *Davis v. The People*, (1 *Park.* 447,) it was held that mere possession of the stolen goods, without other evidence of guilt, was not to be regarded as *prima facie* or presumptive evidence of burglary; and because the court so charged in effect, against exception, the conviction and judgment were reversed. This, however, was a case where, as stated in the opinion, there was "no evidence of any guilty conduct whatever," and as further stated, there was "room for doubts whether the prisoner ever had the goods in his custody." But it was remarked by the learned judge in that case, that he was of the opinion "that in a case where goods had been feloniously taken by means of a burglary, and they are immediately, or soon thereafter, found in the actual and exclusive possession of a person who gives a false account or refuses to give any account of the manner in which he came to the possession, proof of such possession and guilty conduct is presumptive evidence, not only that he stole the goods, but that he made use of the means by which access to them was obtained."

In the *Commonwealth v. Millard*, (1 *Mass. Rep.* 6,) the prisoner was indicted for shop breaking and stealing from the shop. The goods stolen from the shop were found in his possession, and no attempt was made to explain how he came by them. It was held that the proof amounted to presumptive evidence, not only that the prisoner stole the articles taken from the shop, but also of his breaking and entering. Now in the case at bar, the evidence against

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the prisoner was not of the mere possession of the property taken on the occasion of the burglary; but there was also evidence of guilty conduct, such as the authorities declare, when superadded to the possession, to be sufficient to warrant a conviction for burglary. It was not, therefore, a case to which the request to charge was adapted, and the court might well have refused the request, for that reason. (*Hope v. Lawrence*, 50 Barb. 258.) Concede that the prisoner had the possession of the stolen property, as the request assumes, and the superadded proof of guilty conduct made it a case of presumptive burglary. The case was not one of mere naked possession by the prisoner. But the refusal to charge as requested, should be considered in connection with the remarks of the court, which immediately followed and accompanied it. It was said in *Sperry v. Miller*, (16 N. Y. 413,) that "in considering whether a single proposition contained in a charge is erroneous, it is to be construed in connection with the context. The whole charge, or so much of it as is connected with and tends to modify or explain the part claimed to be objectionable, is to be considered in determining whether an error has been committed." When the exception was taken to the refusal to charge as requested, and immediately thereupon, the court stated to the jury as follows: "I will charge this way; that the possession of stolen property, immediately after the commission of the offense, is *prima facie*-evidence of guilt. In other words, the accused is called upon to explain how the property came to his possession."

This, then, was the way in which the judge intended his instructions to the jury to stand; and he may be regarded as qualifying his ruling on the request to charge by this explanation or substituted instruction, so far as it differs from the request. Now to the charge in this form there is no valid objection, considered with reference to the state of the case on the proof. As above remarked,

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there was evidence of what is deemed guilty conduct, superadded to the fact of possession of the stolen property. The case therefore falls, in this view, directly within the decision in *Jones v. The People*, (6 Park. 126.) In that case the prisoner was convicted of burglary and larceny. The stolen goods were found in the prisoner's possession, who made no attempt to show how she came by them, or to explain her possession. The court charged the jury that the finding of the stolen property, shortly after it was taken, was presumptive evidence of the guilt of the person in whose possession it was found. The court held that there was no error in this charge. Welles, J. remarked as follows: "In regard to the charge, it must be borne in mind that it was competent under the indictment to convict the prisoner, either of a simple larceny, or of the burglary and larceny. It never was doubted that on a trial for larceny, after the *corpus delicti* was proved, and evidence given that the stolen goods were found in the possession of the accused, such possession, unexplained, was *prima facie* evidence that the person in whose possession they were found was the person who committed the larceny. The charge went no further than this."

The charge of the court in this case was therefore unexceptionable, considered with reference to the crime of larceny, and most assuredly so when made in a case where there was other evidence, superadded to the mere possession of the stolen property, indicative of guilt.

My conclusion, then, is that the request to charge the jury that the mere possession, by the prisoner, of the stolen property was not *prima facie* evidence of the commission of the burglary by him, was properly refused, inasmuch as the case was not one of mere possession by the prisoner of the stolen property, but it contained other proof indicative of guilt; and if wrong in this, we must

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regard the ruling on the request to charge as intended to be qualified, and in fact qualified and superseded by the instruction thereupon immediately given. Such was the manifest intention of the court, and was doubtless so understood and accepted by the jury at the time. It has been above seen that the exception to the charge was not well taken. That point is decided in *Jones v. The People*, (*supra.*)

In the course of the trial two exceptions were taken to the ruling of the court as to the admission of evidence. But no point of error is now made by the prisoner's counsel for that cause; and there is obviously no ground for complaint in that regard.

After a careful examination of the case, I am of the opinion that the record discloses no ground of error calling for a reversal of the conviction and judgment.

The conviction and judgment of the sessions must be affirmed, and the record remitted to the Saratoga sessions, to the end that the sentence and judgment of that court may be carried into effect, and the prisoner, if on bail, should submit himself thereto.

Judgment affirmed.

[SCHENECTADY GENERAL TERM, January 6, 1870. *Rosekrans, Potter, Bockes* and *James*, Justices.]

THE PEOPLE, *ex rel.* John B. Haskin, *vs.* THE BOARD OF
SUPERVISORS OF THE COUNTY OF WESTCHESTER.

The correction of errors in the proceedings and determinations of inferior political jurisdictions is matter of legal, and not of equitable, cognizance.

There is a wide and radical distinction between bringing the record of the proceedings of an inferior body before the court, for the purpose of having them reviewed and passed upon directly by the courts, and either reversed or affirmed, and bringing an original action, founded on some alleged error in the proceedings of such body, and demanding judgment, not upon errors in the record, but upon the allegations of error, in the complaint.

The office which a relator performs is merely that of instituting a proceeding for and in behalf of the people.

The people themselves being the plaintiffs, in a proceeding by mandamus, it is not of vital importance who is the relator, so long as he does not officiously intermeddle in a matter with which he has no concern. The reason applies, with equal force, to the question as to who is a proper relator in a writ of *certiorari*.

If a tax is erroneous as to an individual, he has his remedy by writ of error or *certiorari*. And if the writ can be used to correct an error where the interest of one individual is injuriously affected, there can be no sound reason why it should not be invoked when the rights of a community are invaded.

The public have the same interest that a public act, like the laying of a tax, shall be properly performed, as they have that a public officer shall do his duty; and if a mandamus can be sued out, on the relation of a tax-payer, to compel assessors to levy a tax, the same reasoning will sustain a writ of *certiorari* to correct an erroneous tax.

It is no objection to such a writ that it removes the records of more than one road opened by the legislature, under different laws passed at different times, and by different commissions; that the parties are different, the subjects are different, the errors assigned are different, and the judgment may be different; where there is but one warrant, and one assessment upon which such warrant is based, sought to be reviewed.

Although the relator in a *certiorari* has made more assignments of error than the facts warrant, or some improper parties are made defendants, it is proper for the court to quash or correct such part of the proceedings sought to be reviewed as are illegal, and affirm such as are legal, provided one is independent of the other.

The court will, in the exercise of a sound discretion, review the proceedings to be brought up by the writ, or give judgment quashing the writ, and will consider the case upon its merits if the public interest will be thereby subserved.

On a common law writ of *certiorari*, the inquiry is not limited to the question

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whether the inferior tribunal had jurisdiction of the subject matter, and its proceedings and judgment were within that jurisdiction; but the court will examine the case upon the whole evidence, to ascertain whether any error has been committed.

APPEAL by the relator from an order made at special term, superseding a *certiorari*.

By the Court, PRATT, J. This is an appeal from an order made at special term, superseding a common law writ of *certiorari*, allowed to review and correct certain items alleged to have been illegally included in the tax levy and warrant to be issued against the town of West Farms, in the county of Westchester.

The relator is simply a resident and tax-payer in the town of West Farms. It is claimed, from this fact, that the people have no standing in court, and the following cases are cited as sustaining such view: *Hale v. Cushman*, (6 *Metc.* 425;) *Doolittle v. Supervisors of Broome Co.*, (18 *N. Y. Rep.* 155;) *Roosevelt v. Draper*, (23 *id.* 318.)

It is apparent, from the slightest examination of these cases, that they sustain no such doctrine, but are based upon an entirely different principle, that has no application here. Each of these cases were bills in equity, filed by a private person, in his own name, to enjoin public officers from doing certain acts; or, in other words, the result sought was to compel public officers to litigate with them questions in which the plaintiffs had no interest which was not common to the whole community. The bills were all dismissed, upon the ground that the plaintiffs did not make out a case under some acknowledged head of equity jurisdiction. They sought to litigate a question on the equity side of the court, which was purely of legal cognizance.

It has always been held in the English courts, and in this country, with some improper exceptions, that the correction of errors in the proceedings and determinations

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of inferior political jurisdictions is matter of legal, and not of equitable, cognizance. The courts hold there is a wide and radical distinction between bringing the record of the proceedings of an inferior body before the court, for the purpose of having them reviewed and passed upon directly by the courts, and either reversed or affirmed, and bringing an original action, founded on some alleged error in the proceedings of such body, and demanding judgment, not upon errors in the record, but upon the allegations of error, in the complaint. In the former case the judgment is final and conclusive, and enures to the benefit of the whole community. In the latter the judgment only settles the rights of the particular plaintiff, and opens the door to excessive litigation; and hence the rule that the courts will not extend equitable jurisdiction over the acts of inferior bodies, and allow every one to come in and litigate. There are some exceptions to this rule, but it is not necessary to discuss them in this connection. I acknowledge not only the binding force of the rule, but the sound reasons upon which it is based. (25 N. Y. Rep. 312. 14 id. [4 Kern.] 540.)

Mr. Haskin was a proper person for relator. The office which a relator performs is merely instituting a proceeding for and on behalf of the people. The distinction between a tax-payer who acts as relator in a legal proceeding, in which all the inhabitants of a political division of the State have a common interest, and a suit by a private individual to redress a wrong personal to himself, is clearly recognized in the case of *The People v. Halsey*, (37 N. Y. Rep. 344.) The court there says: "The difference between a case where an individual acts as relator or representative of the people, to redress a public wrong by mandamus, and one where it is sought to accomplish the same result by an individual, in an action in his own name, is strikingly apparent." Inasmuch as the people themselves are the plaintiffs, in a proceeding by mandamus, it

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is not of vital importance who the relator should be, so long as he does not officiously intermeddle in a matter with which he has no concern. The reason applies with equal force to the question as to who is a proper relator in a writ of *certiorari*. It is conceded that if a tax is erroneous as to one individual, he has his remedy by writ of error or *certiorari*. (37 *N. Y. Rep.* 511. 40 *id.* 154.) Yet if all the people of a town, or other political division, are erroneously taxed, no one can have a remedy, except the attorney-general sees fit to institute proceedings to correct such error. In other words, if public officers attempt to rob one person by an illegal tax, it can be prevented by the courts; but if they include a whole community in the scheme, they thereby secure immunity from investigation. That there is no such rule of law, is apparent. If the people's writ of *certiorari* can be brought in requisition to correct an error, where the interest of one individual is injuriously affected, there can be no sound reason why it cannot be invoked when the rights of a community are invaded. The public have the same interest that a tax shall be proper as to a town or aggregation of individuals, as it has that it shall be right as to one person. It may also be said that the public have the same interest that a public act, like the laying of a tax, shall be properly performed, as they have that a public officer shall do his duty; and if a mandamus can be sued out, on the relation of a tax-payer, to compel assessors to levy a tax, the same reasoning will sustain a writ of *certiorari* to correct an erroneous tax. (15 *Barb.* 255. 4 *id.* 9. 1 *Salk.* 146. 24 *Wend.* 249. 5 *Den.* 206. 8 *Pick.* 218. 1 *Metc.* 122. 2 *id.* 225. 15 *Pick.* 243. 5 *Gray*, 451. 6 *Cush.* 306. 19 *Pick.* 298.)

In my judgment, the proceeding is correct in form, and the proper remedy.

The second objection is, that the writ removes the records of more than one road opened by the legislature,

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under different laws and by different commissions, and passed at different times; the parties are different, the subject is different, the errors assigned are different, the judgment may be different.

It is a sufficient answer to this point to state that there is but one warrant, and one assessment upon which such warrant is based, sought to be reviewed. It is the record of the tax assessment for the town of West Farms alone that is sought to be brought before the court for review. It is the tax record that is alleged to be erroneous; and the fact that there is more than one error, or that more than one statute is involved, is immaterial, provided the proper parties are summoned, so that the alleged erroneous record is produced before the court.

But suppose the relator has made more assignments of error than the facts warrant, or that some improper parties are made defendants; it is proper for the court to correct or quash such part of the proceedings sought to be reviewed as are illegal, and affirm such as are legal, provided one is independent of the other. (13 *Mass. Rep.* 433. 13 *Pick.* 195. 5 *Mass. Rep.* 420, 424.) The order superseding the writ was appealable from the special to the general term. (*Wells v. Jones*, 2 *Abb. Pr. Rep.* 20.) The case referred to in 19 *N. Y. Rep.* 531, has no application, as that case simply holds that the order of affirmance made at general term was not appealable to the Court of Appeals.

The question now is, whether this court, in the exercise of a sound discretion, will review the proceedings to be brought up by the writ, or give judgment quashing the writ. Inasmuch as this proceeding rests in the sound discretion of the court, we should grant or refuse the process as the ends of justice and the public interest may require. I think the public interest will be subserved by considering the case upon its merits.

The error complained of in the tax is independent, and

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unconnected with the other items making up the assessment. No part of the alleged erroneous tax has been collected, while the other taxes, or, in other words, the proper taxes, less the items alleged to be erroneous, are in the course of collection. No litigation can ensue from a judgment for the relator, from the fact that the erroneous items will be expunged. On the other hand, if the writ is quashed, each party who deems the tax illegal can and will resist its collection. I cannot see that the defendants, or the people of the town, can be injured, but I do think they will be benefited, by a decision upon the whole merits. Upon the ground, therefore, that the relator has a *status* in court, and that there should be a return by the respondent to the writ, as to Berrian avenue, and in order that the case may be considered upon its merits, the order at special term, superseding the writ, should be reversed.

The limits in which this court will exercise its power in reviewing the proceedings and determination of inferior tribunals, has been the subject of much discussion and some contrariety of opinion; but the rule, as best settled by the Court of Appeals, seems to be, "that it is proper for the Supreme Court to review all questions of jurisdiction, power and authority of the inferior tribunal to do the acts complained of, and all questions of regularity in the proceedings; that is, all questions whether the inferior tribunal has kept within the boundaries prescribed for it by the express terms of the statute law, or by well settled principles of the common law." (39 *N. Y. Rep.* 88.) The language above quoted might seem to limit the inquiry of this court to the question whether the inferior tribunal had jurisdiction of the subject matter, and whether its proceedings and judgment were within that jurisdiction; yet in another case, decided in September, 1868, the Court of Appeals holds that it is proper to examine a case brought before the court by the common law writ of *cer-*

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tiorari, upon the whole evidence, to ascertain whether any error has been committed in the proceedings before such inferior tribunal. (*The People v. Board of Police*, 39 N. Y. Rep. 506.) The Supreme Court of this district, in the case of *The People v. Board of Assessors of Brooklyn*, (39 N. Y. Rep. 81,) examined alleged errors in the mode and principle of assessment for taxes, and ordered a correction in particulars not going to the entire assessment, but making an abatement therefrom.

It appearing, therefore, that the relator has a standing in court, and that the commissioners of Berrian avenue have made no return, the order made at special term, superseding the writ, must be reversed, and the respondents required to make a complete return.

Order of BARNARD, J., superseding writ of *certiorari*, reversed, with \$10 costs to the appellant.

[KINGS GENERAL TERM, February 14, 1870. *J. F. Barnard, Gilbert and Tappen*, Justices.]

PATRICK H. HANLON vs. THE BOARD OF SUPERVISORS OF THE
COUNTY OF WESTCHESTER, and others.

To enable a plaintiff to maintain an action against the officers of a county and enjoin the collection of a tax, he must bring his case within some one of the acknowledged heads of equity jurisdiction, viz: (1.) Where the proceedings of the subordinate tribunal will necessarily lead to a multiplicity of actions; (2.) Where they lead, in their execution, to the commission of irreparable injury to the freehold; (3.) Where the claim of the adverse party to the land bought at the tax sale is valid upon the face of the instrument, or the proceedings sought to be set aside, and extrinsic facts are necessary to be proven to establish invalidity or illegality; (4.) Where the tax is upon land, and the law allows it to be sold to collect the tax, and the conveyance to be executed would be conclusive evidence of title; (5.) Where the plaintiff has sustained special injury.

Whenever a case is presented falling within these exceptions, equity will interfere to arrest the excessive litigation, to prevent the irreparable injury, or to

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remove or prevent the cloud upon the title; where no relief can be had by *certiorari*, to review the proceedings, and unless the plaintiff can have an injunction, he will be without remedy.

Where commissioners were appointed, by an act of the legislature, to lay out an avenue, and commissioners of estimate and assessment were directed to be appointed, and the damages agreed upon or awarded, and the expense of working the road, were directed to be levied, assessed and collected as other town charges; but it appeared that, beyond taking the oath of office, and making a contract for the work, the commissioners had done nothing to acquire jurisdiction; that they had not laid out the avenue, although it passed, partly, through private lands; that no map was filed until after an action to set aside their proceedings was commenced, when a map was filed with no date, except that of the year; that no other papers had been filed, with the town clerk; and that no commissioners of estimate and assessment had been appointed; *Held* that the commissioners had no authority to make a requisition for the damages and expenses of opening and working the road; and that the supervisors had no authority to direct the money to be raised, and their action on the subject was not simply illegal, but was wholly void.

Although the remedy against unwise or unjust modes of taxation is to be sought from the legislative department, and not from the judiciary, yet the remedy against legislative encroachments upon the constitution is to be sought from the judiciary.

The provision of the constitution of this State, (*art. 1, § 7,*) directing that when private property shall be taken for any public use, the compensation to be made therefor shall be ascertained by a jury, or by commissioners appointed by a court of record, cannot be waived by an owner of land, who chooses to make an agreement for the amount of compensation, so as to dispense with a jury or commissioners.

The determination of the amount of compensation is in the nature of a judicial proceeding, and where the amount is to be paid for by the public, the public, as a party in interest, have a right to that proceeding.

Under the act of the legislature for laying out Madison avenue, in Westchester county, (*Laws of 1869, ch. 850,*) compensation to the land owners, for the land taken, must be assessed by a jury, or commissioners, before the commissioners named in the act can make a requisition upon the supervisors for the damages and expense of operating and working the avenue.

A statute which merely enacts that all the expenses of laying out, working and grading an avenue shall be paid in the manner provided in another act, without limiting or specifying any amount of money or tax to be raised or applied, does not "state" the tax, as required by article 7, §§ 13, 14, of the constitution. The legislature cannot devolve upon the commissioners the power to *state the tax*.

The legislature has power to appoint commissioners to lay out an avenue in a town, although there are already three commissioners of highways in such town, competent to act. Such commissioners are not town officers.

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MOTION to continue an injunction. The action was brought against the board of supervisors of Westchester county, and the commissioners appointed to lay out and open Madison avenue, in that county, and others, to restrain the collection of a tax.

John B. Haskin, for the plaintiff.

Robert Cochran, S. E. Lyon and W. H. Pemberton, for the defendants.

TAPPEN, J. The plaintiff brings this action as an owner of land on Madison avenue, in the town of West Farms, and seeks an injunction restraining the collection of a tax amounting to \$37,150, and that the commissioners named in the act of 1869, authorizing the laying out of Madison avenue as a highway be perpetually restrained, &c.

The plaintiff alleges, as grounds of action, among others, that he is an owner of lands on Madison avenue; that on May 11, 1869, the act in question was passed; that the commissioners named in the act proceeded to act under the same, and illegally agreed to pay some owners of land to be taken for the avenue, as damages therefor, the sum of \$3500; that no compensation has been paid to the plaintiff, nor has compensation to any person been ascertained by a jury or by commissioners appointed by a court of record. And for special damage, the plaintiff avers that the commissioners named in the act, and those with whom they have contracted, are proceeding to work and grade the avenue, to cut down and through embankments, and to fill low ground, and at the entrance of the avenue, at Morris street, have blasted through thirteen feet of rock, preventing the plaintiff from having access to his property; that great injury is caused to the plaintiff's property by cutting off all ingress and egress, by flooding with water,

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destroying shade trees, fences, &c.; and that thereby a public nuisance is created, specially injurious to the plaintiff. That the commissioners have prepared an estimate in writing of work to be done, as follows:

Right of way,	\$3,500
Grading,	25,000
Dry masonry,	7,500
Counsel fees,	150
Surveyor's fees,	1,000
	<hr/>
	\$37,150

and have asked that the same be incorporated in the tax levy of the town of West Farms, as a town charge; and that the supervisor did present a resolution, accordingly, to the board of supervisors, and caused the same to be passed.

The plaintiff also alleges that the accounts of the commissioners or contractors, in reference to the work in question, have not been presented to, or audited by, the town auditors, nor has any resolution been passed at a town meeting authorizing the raising of the money; nor has any statement of the improvements, or the expense thereof, been rendered to the auditors, or to any town-meeting; that Madison avenue is not in fact a highway; that a portion of the route is through the private property of Florine A. Everson; that the owners of the land taken or adjacent to Madison avenue have not released the same; and that such avenue is therefore a private road.

The bonded debt of the town is then set forth at \$526,000, principally for roads and avenues, under different commissions; that the tax levy for the year is \$245,000, or about \$7 per \$100 of valuation of property in the town, which is estimated, upon the assessors' books, at \$3,376,370, real and personal.

The plaintiff avers the act in question to be void, for

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the reasons, among others, that it does not accurately define the nature of the work, or the powers of the commissioners; that by virtue of the act they propose to take private property for local public use without compensation; that the necessity of the said road has not been determined by a jury of freeholders, and the damages or compensation to be awarded has not been determined in the manner required by the provisions of the constitution; that the act does not *state* the *tax*, as required by the constitution; and that the act is otherwise unconstitutional, because it does not limit the amount of tax to be imposed, or sufficiently define the manner of raising the same. That said act does not repeal the existing general law relating to the laying out and working of highways, and pursuant to which the proceedings respecting Madison avenue should be taken; and finally, that the commissioners have no power to grade and drain the lands upon Madison avenue at the general expense of the town.

The answer of the commissioners sets forth that they have proceeded to lay out and work the avenue pursuant to the provisions of the act, and have already done work thereon to the amount of \$15,000; that they have, by virtue of the authority of said act, presented one estimate to the supervisor, and have asked for the sum of \$37,150, for the purposes of said road; and that, at the request of said supervisor, the board of supervisors did pass a resolution authorizing the raising of that amount, and directing that the same may be incorporated in the annual warrant for the collection of taxes for the year 1869, in the town of West Farms. They aver that a certain portion of Madison avenue has heretofore been dedicated, laid out and worked as a public highway; and they admit that no releases have been given for the land over which the road is laid out; and they aver that they have entered into an agreement with one of the owners, (Everson,) by which

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a right of way has been acquired, and the owner's claim for damages mutually agreed upon at \$3000.

The affidavits of the supervisor and receiver of taxes are also presented, showing that the annual tax warrant was made out and delivered to the receiver, before the actual service of the injunction, though on the day of its service, and that he had collected a small amount of tax.

There is also a certificate of the clerk of the board of supervisors, showing that on December 2, 1869, a resolution was passed and papers presented, as follows :

“ Resolved, That there be levied, assessed and collected, upon the taxable property of the town of West Farms, \$37,150, for the purpose of working and grading a certain highway in said town, known as Madison avenue, according to an act passed May 11, 1869, and report herewith presented.

Estimate of amount required regulating and grading Madison avenue.

Right of way,	\$3,500
For grading,	25,000
Dry masonry, retaining walls and culverts,	7,500
Counsel fees,	150
Surveyor's,	1,000
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Total amount,	\$37,150
Dated November 22, 1869.	

JOHN KERBY,
SAMUEL M. PURDY,
ALBERT AYRES,
JOHN J. HUNT,
Commissioners.
JOHN L. MAPES,
Engineer.”

“These are all the papers before the board relative to Madison avenue.”

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The annual tax warrant is also offered, by which it appears that in addition to the other sums of money directed to be collected, there is an item "for working and grading Madison avenue, the sum of \$37,150." This is a distinct and specific item.

The plaintiff, by the affidavit of the town clerk and others, shows that no paper was filed in that office in relation to Madison avenue, save a map and survey filed December 30, 1869, after the passage of the resolution by the board of supervisors, and after the making out and delivery of the tax warrant; that no bill or account has been presented to the town auditors, or at any town meeting, in respect to Madison avenue, and that the town of West Farms is one highway district, and has three commissioners of highways, duly elected and performing the duties of their office; also showing that Madison avenue has never been a highway; that a portion of the land now required is private property; and that the whole length of the intended highway, for which thirty-seven thousand one hundred and fifty dollars is to be raised, is six thousand eight hundred feet, or about one mile and a quarter; that a portion thereof is in front of the police station house and town hall, which is town property; and that the intended road has there been excavated to the depth of thirteen feet in the solid rock, making the premises inaccessible to the people of the town.

One Sebastain Neuberger also joins with the plaintiff in prosecuting the action, and alleges that he is the owner of property on Madison avenue, consisting of a house and lot, for which he paid sixteen thousand dollars, in March, 1867; and that the commissioners are filling up the avenue in front of his premises from two to six feet in depth, preventing the use of his basement and stable, causing the water to flow upon his premises, making the use thereof as a dwelling dangerous to health, and entailing loss and damage which cannot be estimated in money.

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There are many other facts set forth in the papers on either side, and a number of affidavits on either side, which have no bearing, and are not considered here. The salient points are here stated, and it remains to determine the law applicable to the case as presented, which will be done in the following order :

1. As to the standing of the plaintiff, and those joining with him, in maintaining this action.

2. As to the power of the commissioners under the act.

3. As to the constitutionality of the act.

To enable the plaintiff to maintain this action and enjoin the collection of the tax, he must bring his case within some one of the acknowledged heads of equity jurisdiction, which are held to be as follows. (*Heywood v. City of Buffalo*, 14 N. Y. Rep. [4 Kern.] 541.)

1st. Where the proceedings of the subordinate tribunal will necessarily lead to a multiplicity of actions.

2d. Where they lead, in their execution, to the commission of irreparable injury to the freehold.

3d. Where the claim of the adverse party to the land bought at the tax sale is valid upon the face of the instrument, or the proceedings sought to be set aside, and extrinsic facts are necessary to be proven to establish invalidity or illegality.

Also, where the tax is upon land, and the law allows it to be sold to collect the tax, and the conveyance to be executed by the proper officer would be conclusive evidence of title. (*Susquehanna Bank v. Supervisors of Broome*, 25 N. Y. Rep. 314.) And in *Milhau v. Sharp*, (27 id. 611,) the plaintiff's right to an injunction restraining a railway in Broadway was upheld upon the ground of *special injury*.

The plaintiff avers multiplicity of actions, but that does not appear as a fact. He avers irreparable injury to the freehold by the action of the commissioners, and he specifies the grounds thereof. The defendants generally deny

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the averment, but do not deny the grounds set forth by the plaintiff.

The plaintiff also shows that it does not appear on the face of the proceedings of the board of supervisors that the tax is illegal, and consequently the proceedings to levy and collect the tax involve a tax sale, and create a cloud upon the title; and in the cases quoted it is held that when a case is presented falling within these exceptions, equity will interfere to arrest excessive litigation, to prevent the irreparable injury, or to remove or prevent the cloud upon the title.

Numerous cases are referred to in which the courts refuse to restrain the collection of a tax, and among the reasons given therefor, it is said "that the usual and undoubted remedy by *certiorari* is always open to every party conceiving himself aggrieved." That writ brings up the proceedings of the inferior body for review, and judgment passes directly upon their proceedings. Inasmuch as the *certiorari* to review the proceedings of the Madison avenue commissioners has been superseded by another tribunal, it would seem that the plaintiff herein must have an injunction, or be without any remedy.

In *Mohawk and Hudson Railroad Co. v. Clute*, (4 Paige Ch. R. 384,) the application was for an injunction restraining the collectors of the town of Rotterdam, and of the second ward of the city of Albany, from collecting the taxes which had been imposed upon the capital stock of the company, as real estate, in each of those places; and an injunction was granted against the Albany collector, after argument before the chancellor. In the case of *Redfield v. Supervisors of Genesee*, the plaintiff sought to restrain the collection of a tax by the town of Le Roy, and the motion was granted. The bill was filed against the supervisors before the issuing of the warrant; and the vice chancellor observes that there could be no objection to that course, as it avoids multiplicity of actions, which

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would have been necessary had the complainant waited until the warrants were placed in the hands of the collectors of some twenty towns. (*Clarke Ch. 42.*)

In *Crooke v. Andrews*, (40 *N. Y. Rep.* 550,) the court reiterated the rule that a bill in equity would not lie to restrain the assessment or collection of taxes, but upheld the action, which was to remove a cloud upon the plaintiff's title arising from an illegal tax sale.

An incumbrance valid upon its face, which can only be impeached by proof of extrinsic facts, presents a case for invoking the aid of a court of equity to remove it as a cloud upon the title; and a bill will lie, as well to prevent a cloud as to remove one. (5 *Paige*, 493. 6 *id.* 262.)

The powers of the commissioners under the Madison avenue act may be briefly considered. They are appointed commissioners to lay out Madison avenue. They shall proceed, and commissioners of estimate and assessment shall be appointed, in the manner provided by the Fairmount avenue act. (*Laws of 1868, ch. 736.*) All proceedings of the commissioners of estimate and assessment, and all legal proceedings concerning the manner of confirming their report, and appeals therefrom, shall be conducted, and all expenses of laying out, working, extending, &c., shall be paid in the manner provided by that act; and that act provides for an application to the county judge for the appointment of three commissioners to award damages, pursuant to existing laws upon the subject of laying out highways; and the damages agreed upon or awarded, and the expense of working the road, shall be levied, assessed and collected as other town charges.

It appears, therefore, that beyond taking the oath of office, and making a contract for the work, the commissioners have not done anything to acquire jurisdiction. They have not laid out Madison avenue, which, it is conceded, passes partly through private lands. No map was filed until December 30th, 1869, after these proceedings

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were commenced; and on that day a map was filed with no date, save the year 1869. No other papers have been filed with the town clerk. The agreement with Florine A. Ever-son, for about three thousand dollars, which was to be paid for her land, is without power on the part of the commissioners, not only because of the constitutional provision, but because the act in question directs damages to be awarded pursuant to the existing highway laws; and, as has been shown, such laws limit the power to agree upon damages to the sum of one hundred dollars; and no commissioners of estimate and assessment have been appointed.

It is quite clear, therefore, that the requisition of the commissioners for the sum of thirty-seven thousand one hundred and fifty dollars was premature, and was wholly without authority at the time it was presented to, and the resolution passed by, the board of supervisors. The supervisors, therefore, had no authority to direct the money to be raised, and their action on the subject is not simply illegal; it is wholly void.

As to the question of constitutionality, it is to be conceded that the remedy against unwise or unjust modes of taxation is to be sought from the legislative department, and not from the judiciary. (*The People v. The Mayor &c. of Brooklyn*, (4 N. Y. Rep. [4 Comst.] 419.) But it is equally true that the remedy against legislative encroachments upon the constitution is to be sought from the judiciary. (*Cooley's Const. Lim.* 494, 495.)

The constitution of the State provides, in art. 1, sec. 7: "When private property shall be taken for any public use, the compensation to be made therefor, when such compensation is not made by the State, shall be ascertained by a jury, or by not less than three commissioners appointed by a court of record, as shall be prescribed by law. Private roads may be opened in the manner to be prescribed by law; but in every case the necessity of the road, and the amount of all damages to be sustained by

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the opening thereof, shall be first determined by a jury of freeholders; and such amounts, together with the expenses of the proceedings, shall be paid by the person to be benefited."

The compensation to Florine A. Everson, or to other owners, has not been ascertained in the manner here required. The commissioners named in the Madison avenue act, (*Laws of 1869, ch. 850,*) are not therein authorized to make any agreement, but the act does provide that the commissioners shall proceed, and that all the expense of laying out, working, &c., shall be paid in the manner provided in another act, in relation to Fairmount avenue, passed May 8th, 1868, (*Laws of 1868, ch. 736 ;*) and by this act, commissioners therein named are authorized to make an agreement to pay the owners of land taken for the highway such damages as they shall mutually agree upon, &c.

It is claimed by the defendants, that the constitutional provision may be waived by the owner of the land, who chooses to make an agreement for the amount of compensation, and when such compensation is so agreed upon, no jury or commissioners are essential. I am not of that opinion. The determination of the amount of compensation is in the nature of a judicial proceeding, and where the amount is to be paid for by the public, the public, as a party in interest, have a right to that proceeding. (*Charles River Bridge v. Warren Bridge, 7 Pick. 344. 11 Pet. 420, 571. House v. City of Rochester, 15 Barb. 519. Clark v. City of Utica, 18 id. 451.*)

The general highway law of the state recognizes this view of the question, and enacts "that damages may be ascertained by the agreement of the owner and the commissioners of highways, providing such damages do not exceed one hundred dollars;" and beyond this amount the damages cannot be fixed by agreement. Again; the Madison avenue act nowhere provides, or limits, or specifies any amount of money or tax to be raised and applied.

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It enacts that all the expenses of laying out, working and grading, &c., shall be paid in the manner provided in the act of 1868, (*supra*;) and it also enacts, that the board of supervisors of the county of Westchester are "hereby directed to order a tax to be levied and assessed as provided in the act of 1868; and when collected, the receiver of taxes is to pay the same to the commissioners for the purposes aforesaid."

Article 7, of the constitution, sections 13, 14, reads: "Every law which imposes, continues or revives a tax, shall distinctly *state* the tax, and the object to which it is to be applied, and it shall not be sufficient to refer to any other law to fix such tax or object."

The Madison avenue commissioners have here undertaken legislative functions, by stating *the tax*, i. e., the amount which they desire to be raised. No sum is named or limited in the act, and consequently no sum is authorized. It will not be claimed that the legislature can devolve upon the commissioners the power to *state the tax*. I cannot concede the view taken by the defendants' counsel, upon any construction of the English language, or any construction of this constitutional provision, that the Madison avenue act, by directing a tax to be levied and collected for the purposes of the act, thereby states the tax; it only states the object to which it is to be applied when collected.

And this view is confirmed by reference to article 8, section 9, of the constitution, which says it shall be the duty of the legislature to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debt and loaning credit, so as to prevent abuses in assessments, and in contracting debts by such municipal corporations. By this section, cities and villages may, by charter, have certain and restricted powers of correction conferred upon them as municipal corporations; but the section is ex-

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pressly limited to cities and villages governed and organized as municipal corporations; and if it be the duty of the legislature, in such cases, to restrict the power of taxation and contracting debt, it cannot be held with any force that the legislature may authorize one or more persons, who are constituted commissioners for a specified local object, to impose, or require the supervisors to impose, unlimited taxation, or to contract unlimited debt.

An examination of local statutes shows that in most cases the principle of stating the amount of tax or limitation of debt is recognized and acted upon by the legislature. For instance, in the township in question, the act in relation to Locust avenue (1 *Laws of 1869*, p. 106, *ch.* 65) authorizes a town debt of \$36,000. Chapter 380 of same volume, page 858, in relation to Fordham and Pelham avenues, authorizes a debt or expenditure for all purposes, not exceeding \$20,000 per mile. Chapter 549 of the laws of 1868, (*vol.* 2, p. 1118,) in relation to the Westchester post road, authorizes a debt or expenditure not exceeding \$10,000 per mile. Chapter 849 of the Laws of 1869, (*vol.* 2, p. 2046,) in relation to Franklin avenue, authorizes the town of West Farms to raise by loan such sum as may be deemed necessary by the commissioners for the purpose of the act, not exceeding \$25,000. Chapter 851 of the same volume, page 2049, in relation to Fairmount avenue, expressly limits the cost of the work to a sum not exceeding \$10,000, and provides that one third thereof shall be assessed upon adjoining lands, and the remaining two thirds shall be raised as a town charge. And there are many other acts authorizing the laying out and working of public highways in other towns, in which the expense is specified and limited.

The plaintiff claims that inasmuch as the town has three highway commissioners, competent to perform all statutory duties in respect to highways, the appointment, in the Madison avenue act, of commissioners to lay out that

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highway, is an infringement of the constitution, (*art.* 10, § 2,) which provides that “all city, town and village officers, whose election or appointment is not provided for by this constitution, shall be elected by the electors of such cities, towns and villages, or of some division thereof, or appointed by such authorities thereof as the legislature shall designate for that purpose. All other officers whose election or appointment is not provided for by this constitution, and all officers whose offices may be hereafter created by law, shall be elected by the people, or appointed as the legislature may direct.”

The controlling decision on this point is found in *The People v. Draper*, the Metropolitan Police case, (15 N. Y. Rep. 532,) in which it was held that offices created after the adoption of the constitution of 1846, might be filled in the manner authorized by the legislature, and that the legislature might create new districts for special purposes, and designate how the offices therein should be filled. (P. 547.)

The commissioners in the Madison avenue act are not town officers; they have a limited special duty assigned to them, and under the decision quoted, it was competent for the legislature to appoint them for the purposes of that act.

It will be seen that there are now in existence in one town five or six special commissions, acting under special laws for the laying out, in each case, of a particular road or avenue, with power to contract debts or expend moneys for the town, to a certain amount in most instances, but in several cases without any limitation; and that besides all these, there are three highway commissioners exercising the functions of their office.

It is not for the courts to question the wisdom of this legislation, which multiplies laws upon the yearly statute book, and the community interested or objecting must seek its remedy at the hands of the legislature.

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From the facts and the law, I am, therefore, brought to the conclusion that the plaintiff makes out an apparent case for equitable relief, and that such relief, in the present aspect of the case, can only be had by restraining the collection of the Madison avenue tax; that no public inconvenience will result therefrom, inasmuch as it is one specific item, in no way involved in, or connected with, the other items in the tax warrant held by the receiver of taxes, and that the collection of such other items need not be delayed, except for the brief time required to compute the rate of tax, less the rejected Madison avenue item. The supervisor having delivered the tax warrant to the receiver of taxes before service of the injunction, the motion to continue the injunction as to him is denied, with \$10 costs; and as to all the other defendants, the motion to continue the injunction is granted, with \$10 costs to abide the event.

[KINGS SPECIAL TERM, March 7, 1870. *Tappen*, Justice.]

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JOSEPH H. RAMSEY vs. JAY GOULD, JAMES FISK, Jr., FREDERICK A. LANE and others.

On a question whether an action can be maintained, or not, against the officers of a railway company, to compel them to account for their official conduct in the management and disposition of its funds and property, and, upon allegations of abuse of trust and gross misconduct, to obtain their suspension and removal from office, if the plaintiff stands in the relation to the defendants, of a creditor or stockholder of the company, authorizing him to bring the suit, the court has no right to look into his motive in bringing it. And although, in moving such action, the plaintiff's malice is gratified, or his independent litigations incidentally subserved, still, unless the court can plainly see that he has no meritorious cause of action, or that he is estopped from prosecuting it, his prosecution of it will not be deemed a perversion or abuse of the process of the court. This is equally true in a court of equity, as in a court of law.

The inquiry in each court must be with reference to the plaintiff's right of

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action, and whether in it are involved interests entitled to the protection of the court, and not to his ulterior motives and purposes in bringing the suit.

If, in an action against the officers of a railway company, to compel them to account for their official conduct and to obtain their suspension and removal from office, on the ground of misconduct and abuse of trust, the plaintiff is, in fact, the owner of bonds and stock of the company, he is *personally interested* in obtaining the relief sought by him; and this being so, the court, in inquiring whether the action is prosecuted for the purpose of obtaining that relief, or for the mere abstract purpose of "bringing men to justice," must look to the cause of action shown, and the judgment demanded, in the complaint, rather than to motives or purposes elsewhere avowed, or shown to exist.

In such an action the plaintiff has no inequitable advantage which he is seeking to enforce against the defendants. His buying the stock and bonds of the company was no wrong done them, with whatever intent it was done. The relative rights of the parties are the same as if the suit were brought by the plaintiff's vendor. The intent with which he purchased does not change or affect those rights or raise any equities respecting them, in favor of the defendants. In regard to them, his hands are "clean," and the rule of equity requires no more.

His bringing the suit, after having become invested with the bonds and stock, is not *bad faith*, such as the courts will relieve against.

There are no cases where the courts have perpetually stayed proceedings as being against *good faith*, except where the suits were brought in violation of some arrangement or understanding between the parties. *Per PARKER, J.* If the plaintiff can, as a stockholder, bring the officers of a corporation into court, for any portion of the relief demanded in the complaint, the case cannot be summarily disposed of by a dismissal of the complaint, or an order perpetually staying proceedings in the action.

Where the plaintiff brings the action on his own behalf and on behalf of all others having a common interest, and he alleges that the officers named as defendants control the company, he may, as a *stockholder* maintain the action for such portion of the relief demanded as does not depend upon the authority of the statute relative to "proceedings against corporations in equity," although he be not a *creditor* of the company.

The purchase of the stock of a corporation, by an attorney, is not a violation of the statute prohibiting an attorney from purchasing any bond, thing in action, &c., with the intent and for the purpose of bringing a suit thereon.

The purchase of stock is not within the prohibition; it not being one of the securities or evidences of debt mentioned, nor a chose in action, within the meaning of the statute.

The statute is a penal one, and cannot be extended to what is not expressly included in it.

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A motion to set aside an order appointing a referee to take the deposition of a witness, under section 401 of the Code of Procedure, must be made by the witness, himself, and not by the adverse party.

MOTION by the defendants, to dismiss the complaint, or to perpetually stay the proceedings, or for an order to strike out portions of the complaint, &c. The facts sufficiently appear in the opinion.

T. G. Shearman and D. D. Field, for the motion.

R. W. Peckham, Jr., and *H. Smith*, opposed.

PARKER, J. This action is brought by the plaintiff, as a creditor and stockholder of the Erie Railway Company, for the purpose, among other things, of compelling the officers of the company, who are named as defendants, and who are charged, in the complaint, with having the control of its affairs, to account for their official conduct in the management and disposition of its funds and property; and, upon allegations of abuse of trust and gross misconduct by them, in respect to such funds and property, to obtain their suspension and removal from office.

The complaint has been served, but it does not appear that any answer has been put in.

In this condition of the case, a motion is made, on the part of the defendants, founded upon the complaint and an affidavit of the plaintiff taken before a referee appointed under section 401 of the Code, and various other affidavits, for an order dismissing the complaint, or perpetually staying proceedings in the action, or, in case such motion is denied, for an order that portions of the complaint indicated be stricken out as irrelevant or redundant, and that the complaint be made more definite and certain.

A motion is also made to set aside an order granted at a special term of this court, held at Albany, on the 24th of January last, appointing a referee to take the deposition

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of A. S. Diven, to be used on the motion first above mentioned, and upon "a motion to be noticed by the plaintiff in this court."

The motion to dismiss the complaint, or to perpetually stay the proceedings in the action, is based upon three principal grounds:

First. That the suit is not brought in good faith for the purposes avowed in the complaint, but is an attempt to pervert and abuse the process of the court to purposes of retaliation and revenge, and to compel the defendants to cease a litigation in which the plaintiff has an adverse interest; and moreover, that the plaintiff became the holder of the stock and bonds which he claims to own, with a full knowledge that the acts of which he complains had been done, and for the purpose of bringing this action.

Second. That the plaintiff is not in fact a creditor of the Erie Railway Company, in the sense required, to entitle him to maintain the suit; and if he is, that since the commencement of the suit, the company has tendered to him full payment of all the demands which he claims to hold against it.

Third. That the plaintiff, when he purchased the bonds and stock mentioned in the complaint, was an attorney at law, practicing as such; that he purchased all the stock, securities and indebtedness of the company, which he claimed to have at the commencement of the suit, with intent to commence an action thereon, and that such purchase was a violation of the statute. (2 R. S. 288, § 71.)

In regard to the first ground of the motion, I think it clearly appears from the affidavits, that prior to the plaintiff's purchase of the stock and securities held by him, he had become involved in a litigation respecting the control of the Albany and Susquehanna Railroad Company, in which the defendants Gould and Fisk, and possibly others of the defendants, were parties in interest, adverse to him;

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that when he purchased such stock and securities he believed that said defendants had been guilty of such gross abuse of their trust, as officers of the Erie Railway Company, that the welfare and safety of the company, and the security of its stockholders and creditors, required their removal from office; that among the wrongful acts done by them, he believed they had used the money of the Erie company to purchase the stock of the Albany and Susquehanna Railroad Company, in which he was interested, for the purpose of obtaining control of that company; and believing as aforesaid, he purchased said stock and securities with the intent, if no other person authorized to bring an action against them for the purposes for which this suit is brought could be induced to do so, to bring such suit himself; being influenced, to some extent, in bringing the suit, by the desire to defeat said defendants from gaining the control of the Albany and Susquehanna Railroad, "but mainly," in the language of the plaintiff, "to have them brought to justice."

If the plaintiff stands, in relation to the defendants, as creditor or stockholder of the Erie Railway Company, authorizing him to bring this suit, then I apprehend, on a question whether the suit can be maintained or not, the court has no right to look into the plaintiff's motive in bringing it; and although, in moving it, his malice is gratified, or his independent litigations incidentally subserved, still, unless the court can plainly see that he has no meritorious cause of action, or that he is estopped from prosecuting it, his prosecution of it will not be deemed a perversion or abuse of the process of the court. This is equally true in a court of equity as in a court of law. The inquiry in each must be with reference to the plaintiff's right of action, and whether in it are involved interests entitled to the protection of the court, and not to his ulterior motives and purposes in bringing the suit. The court will see to it that the judgment or decree obtained is such,

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and only such, as the plaintiff, as plaintiff in the suit, is entitled to, and will carefully prevent its process from being perverted to other and illegitimate purposes.

The defendants' counsel argues and insists that a civil action cannot be allowed for the mere abstract purpose of "bringing men to justice;" and that when an individual sues, he must sue for his own personal remedy—for the redress of some wrong personal to himself—for the establishment of justice in some way immediately affecting his own interest; and that unless he seeks redress of this kind, and shows a title to it, he has no standing in court.

This is all very true. But the plaintiff, if in fact the owner of bonds and stock of this company, as he alleges, is *personally interested* in obtaining the relief sought by him; and this being so, in inquiring whether the plaintiff is prosecuting this action for the one purpose or the other, of those mentioned by the counsel, the court must look to the cause of action shown, and the judgment demanded, in the complaint, rather than to motives or purposes elsewhere avowed, or shown to exist.

It is argued by the defendants' counsel, also, that this suit is brought in *bad faith*. That inasmuch as the plaintiff made himself the holder of stock and bonds of this company for the very purpose of complaining that his rights, as such, were invaded, and with full knowledge that the very acts of which he complains had been done when he made the purchase, he is to be regarded rather as a mover and promoter of strife than as a *bona fide* suitor; and that he does not come into court with *clean hands*, as the familiar rule of equity requires, and should, therefore, be dismissed.

I do not see that the equity rule has any application here. That has reference to the relation of the parties, in respect to the matter in controversy. If there is any abuse of that relation by the plaintiff he does not come with "clean hands" to enforce an advantage thus obtained.

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Here the plaintiff has no inequitable advantage which he is seeking to enforce against the defendants. His buying the stock and bonds was no wrong done them, with whatever intent it was done. The relative rights of the parties are the same as if the suit were brought by the plaintiff's vendor. The intent with which he purchased does not change or affect those rights, or raise any equities respecting them, in favor of the defendants. In regard to them, his hands are clean, and the rule requires no more.

His bringing the suit, after having become invested with the bonds and stock, as he did, is not *bad faith*, such as the courts will relieve against. I do not find any cases where the courts have perpetually stayed proceedings as being against *good faith*, except where the suits were brought in violation of some arrangement or understanding between the parties. Such were *Cocker v. Tempest*, (7 M. & W. 502;) *Moscatti v. Lawson*, (4 Ad. & El. 331;) and *Gibbs v. Ralph*, (14 M. & W. 804,) cited by the defendants' counsel. In the other cases cited, proceedings were stayed for different reasons; as in *Webb v. Adkins*, (14 C. B. 401, 407,) which was a suit by an executor, until probate of the will. In *Kerr v. Davis*, (7 Paige, 53,) until the plaintiff paid the costs of a former suit. In *Keeler v. King*, (1 Barb. 390,) which was a suit upon a judgment, the last of a series, each successively obtained upon the previous one, the court perpetually stayed the proceedings, it being evident that the plaintiff's course in bringing the successive suits on the judgment served only to accumulate costs against the defendant, without producing any possible advantage to the plaintiff. In *Robinson v. Meanes*, (6 Dowl. & Ry. 26,) the question decided was, that the court would not sustain a litigation to determine which party had won a wager; and in *Doe v. Duntze*, (6 C. B. 100,) that it would not decide a mere speculative question.

As a further reason, in connection with the first ground of the motion, it is said that the expenses of the suit are

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not borne by the plaintiff, but by one David Groesbeck, and that the plaintiff ought not, for this reason, to obtain any relief in a court of equity. In regard to this, it is sufficient to say that the fact stated is not so clearly proved as to render it necessary, now, to discuss the legal proposition. Groesbeck, it is true, loaned the plaintiff \$30,000, which fund, doubtless, he expected would be drawn from in paying expenses of this suit, but this loan of money the plaintiff is responsible and able to pay; and there is nothing to show that there is any understanding that it is not to be paid; hence it cannot be said that the expenses of the suit are, in reality, borne by Groesbeck, and not by the plaintiff. Clearly that fact is not made so certain as to warrant the court in assuming it as the basis of a proceeding so summary in mode and decisive in effect as that asked for by the defendants.

As a *second* ground of the motion, it is said that the plaintiff is not now, and never has been, a creditor of the Erie Railway Company, and that the defendants have, since the commencement of the suit, tendered to him full payment of all the demands which he pretends to hold.

The fact that the plaintiff is the owner of several bonds issued by the company, not yet due, is clearly shown; also of some of its common and some of its preferred stock. As a stockholder, the defendants claim that the plaintiff has no standing in court in such a suit as this, and that he is not a creditor, unless he has a debt against the company, already due. The plaintiff seeks in regard to part of the relief which he asks, to avail himself of the visitorial power of the court, conferred by the statute, entitled "Of proceedings against corporations in equity," (2 R. S. 461, §§ 33, 35;) and it is clear that he cannot proceed under that part of the statute as a stockholder, but only as a creditor. But whether he is a creditor, within the meaning of section 35 of the statute, I do not deem it necessary for me, on this motion, to inquire. If he can,

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as a stockholder, bring the defendants into court, for any portion of the relief demanded in the complaint, or for any relief properly flowing from the facts stated, then, manifestly, the case cannot be summarily disposed of by a dismissal of the complaint, or an order perpetually staying proceedings in the action.

I am aware that the general rule is, that a suit brought for the purpose of compelling the ministerial officers of a private corporation to account for breach of official duty, or misapplication of corporate funds, should be brought in the name of the corporation, and not in the name of the stockholders, or any of them.

That a court of equity, under its general powers, may take cognizance of such a suit, when properly brought, is undeniable. Notwithstanding the general rule above stated, it is well settled that there are cases in which the stockholders, unitedly, or in the name of one or more suing on behalf of themselves and all others having a common interest, may bring such suit against the officers of the corporation, or such of them as are chargeable with breach of official duty.

Thus it is said in *Angell & Ames on Corporations*, (p. 367:) "As a court of equity never permits a wrong to go undressed merely for the sake of form, if it appear that the directors of a corporation refuse, in such a case, (of waste or misapplication of the corporate funds by the company,) to prosecute, by collusion with those who have made themselves answerable by their negligence or fraud; or if the corporation is still under the control of those who must be the defendants in the suit, the stockholders, who are the real parties in interest, will be permitted to file a bill in their own names, making the corporation a party defendant." In *Robinson v. Smith*, (3 *Paige*, 231,) the chancellor says: "Independently of the provisions of the Revised Statutes, this court had jurisdiction, so far as the individual rights of the corporators were concerned, to

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call the directors to account, and compel them to make satisfaction for any loss arising from a fraudulent breach of trust, or the willful neglect of a known duty." And, speaking of joint companies, he says: "The directors are the trustees or managing partners, and the stockholders are the *cestuis que trust*, and have a joint interest in all property and effects of the corporation." In *Cross v. Sackett*, (16 How. 70,) Judge Hoffman says, after citing several cases, English and American: "The law which may be gathered from these cases is, that there is no wrong or fraud which directors of a joint stock company, incorporated or otherwise, can commit, which cannot be redressed by appropriate and adequate remedies." And in stating the modes of accomplishing this, he says: "The next mode is, where shareholders bring an action for some object unitedly, or in the form which the court of chancery permits, of a bill by one or more on behalf of themselves and all others having a common interest. This right exists under various circumstances. It clearly exists where the directors or agents whose deeds or omissions are impeached do themselves control the company, and impede the assertion of a right in its own name." (*See also Butts v. Wood*, 38 Barb. 181; *S. C. affirmed*, 37 N. Y. Rep. 317.)

The plaintiff brings this action on his own behalf and on behalf of all others having a common interest, and he alleges that the officers named as defendants control the company. He may, as a stockholder, therefore, maintain the action for such portion of the relief demanded as does not depend upon statutory authority.

In this view, the fact of the tender made by the company is unimportant. That depends for its efficacy, if any it has, upon the *indebtedness* of the company to the plaintiff. It is not claimed that it has any effect upon the plaintiff's right, as a stockholder, to maintain the action.

It is evident, therefore, that the motion to dismiss the

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complaint, or to perpetually stay the proceedings in the action, on the *second* ground taken by the defendants, cannot prevail, even if it is true that the indebtedness shown does not make the plaintiff a creditor within the meaning of the statute, or that the tender alleged would be effectual against him as a creditor. .

The *third* ground of the motion is, that the plaintiff's purchase of the bonds and stock mentioned in the complaint was in violation of the statute prohibiting an attorney from purchasing a demand with the intent of bringing a suit thereon. (2 R. S. 288, § 71.) The language of the statute is as follows: "No attorney, counselor or solicitor shall, directly or indirectly, buy, or be in any manner interested in buying, any bond, bill, promissory note, bill of exchange, book debt, or other *thing in action*, with the intent and for the purpose of bringing any suit thereon." Now, however, the plaintiff (who is an attorney) may be prohibited, as creditor, from maintaining this suit by reason of his violation of this statute. As stockholder he is not affected by the statute. The purchase of stock is not within the prohibition. It is not one of the securities, or evidences of debt, mentioned, nor is it a chose in action, within the meaning of this statute. "Chose in action," as defined by *Burrill*, is "a thing which a man has not the actual possession of, but which he has a right to demand by action, as a debt or demand due from another." (See also 2 Black. Com. 338, 396, 397; *Gillet v. Fairchild*, 4 Denio, 82.) The chose in action intended by the statute is one on which a suit can be brought. This action is not brought upon the stock. That is not the cause of action; and although, in some respects, it may resemble a chose in action, it is not strictly such. The statute is a penal one, and cannot be extended to what is not expressly included in it. It is plain, I think, that the purchase of stock was not a violation of the statute, and that the complaint cannot be dismissed upon this ground.

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Inasmuch as the last two grounds taken by the defendants for the dismissal, if legally correct, do not, for the reasons above given, defeat the action and warrant the relief sought by the motion, I have omitted to discuss them, as any opinion which I might express in regard to them would be *obiter*, and therefore uncalled for and improper.

No sufficient reason for dismissing the complaint, or for perpetually staying proceedings in the action, has been shown, and that part of the defendants' motion must be denied.

The alternative part of the motion asks for a modification of the complaint, under section 160 of the Code. The defendants allege that portions of it are irrelevant and redundant; and these they ask to have stricken out; and as to the allegations of the plaintiff's being a stockholder and creditor of the company, they seek to have the complaint made more definite and certain.

In regard to this latter demand of the motion, I am inclined to think the plaintiff should be more specific in his complaint, as to the securities or evidences of debt which he holds against the company, of which he is the owner, to the extent of stating therein the precise nature and amount of the "past due claim for money," mentioned in the complaint, and whether such claim was ever presented to the Erie Railway Company for payment; and if so, when. And further, stating the number of each class of bonds, and of shares of each kind of stock owned by the plaintiff, as alleged in the first six folios of the complaint; and when and by whom the said bonds were made, and when payable; what amount, if any, is now due thereon; whether such amount consists of principal or interest; and whether demand of payment thereof has been made.

The defendants have specified 113 separate portions of the complaint (by canceling the same upon the copy an-

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nexed to the notice of motion) which they allege to be irrelevant or redundant, and ask to have stricken out. I have carefully read the complaint, and considered the several portions objected to, and have come to the conclusion that, as to the portions numbered by the defendants, 5, 8, 10, 11, 12, 13, 14, 15, 16, 17, 20, 28, 44, 50, 51, 53, 60, 61, 63, 64, 66, 67, 70, 72, 79, 80, 81, 83, 84, 85, 91, 102, 103 and 110, the motion to strike out should be granted, and as to all the other portions thereof, it should be denied.

As the defendants have wholly failed upon the principal part of this motion, and have asked for more than they were entitled to upon the alternative part of it, they should pay the plaintiff \$10 costs thereof.

The motion to set aside the order appointing a referee to take the deposition of Mr. Diven is a separate and distinct one. This order was made under the following provision of subdivision 7 of section 401 of the Code: "When any party intends to make or oppose a motion, in any court of record, and it shall be necessary for him to have the affidavit of any person who shall have refused to make the same, such court may, by order, appoint a referee to take the affidavit or deposition of such person."

This motion to set aside the order is made exclusively on behalf of the defendants, and not by Mr. Diven, the witness sought to be examined under the order. It has been held at special term, in this district, that the order is a matter exclusively between the party that obtains it and the person whose deposition is desired, and that such person only can move to have it vacated. That the party obtaining it should not be embarrassed by any motion of the adverse party to set it aside. (*Erie Railway Co. v. Champlain*, 35 How. 73.) This view is supported by the case of *Brooks v. Schultz*, (5 Rob. 656,) to the extent that the party against whom the affidavit is proposed to be read must show that he is injured by the irregularity com-

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plained of, before he can move to set aside the order for the examination of the witness. No such showing is here made by the defendants.

This motion, therefore, must be denied, with \$10 costs.

[TIOGA SPECIAL TERM, March 8, 1870. *Parker*, Justice.]

In the matter of HENRY J. ANDERSON.

Where an ordinance directs an avenue to be curbed and guttered, and sidewalks flagged, without requiring that new flagging shall be used, it is not a ground for setting aside the assessment, that the contractor, under the direction of the street commissioner, finding good flagging on a part of the line, resets it, only charging the expense of the labor,

Neither is it a ground for setting aside the assessment that the lots are charged for the work done opposite each lot, while the expenses are charged on all the property, per foot, equally. That is a matter within the discretion of the assessors, who are to make the assessment according to the amount of benefit each lot receives from the improvement.

Nor is the fact that more than one lot, owned by the same person, is included in one assessment, instead of being separately assessed, any ground for vacating the assessment.

Although it would be better to assess each lot by itself, yet when the same person owns the whole, no injury can be sustained by putting them together.

THIS was an application, made by Henry J. Anderson, under the "Act in relation to frauds in assessments for local improvements, in the city of New York," passed April 17, 1858, (*Laws of 1858, ch. 338*), to vacate an assessment for flagging sidewalks in the First avenue, in the city of New York.

The following grounds of objection to the assessment were specified in the petition.

1. That under an ordinance directing the sidewalk to be flagged, and curbstone to be set, a charge was made for relaying old flagging and resetting curbstones.

2. That the assessments were not apportioned according to the benefit derived by each lot, but that each lot was

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charged with the cost of the work done in front thereof, and the incidental expenses for surveying, advertising, &c., were charged upon each parcel in proportion to the frontage thereof.

3. That the several lots mentioned in the petition were not separately assessed, but were assessed in one parcel.

E. E. Anderson, for the petitioner.

D. J. Dean, for the corporation of New York.

INGRAHAM, J. It is objected to this assessment, that part of the old flagging was relaid, and the old curb reset, and the expense included.

The ordinance directed the avenue to be curbed and guttered, and sidewalks flagged. It does not direct that new flagging shall be used; and if the contractor, under the direction of the street commissioner, finds good flagging on a part of the line and resets it, only charging the expense of the labor, the petitioner has no cause to complain. The ordinance is not violated; it does not appear that he has been injured, and there is clearly no fraud shown; but, on the contrary, a piece of honesty in fulfilling the contract, which is to be commended rather than condemned. It is neither fraud nor legal irregularity in laying the assessment that warrants setting it aside.

The second objection is that the lots are charged for the work done opposite each lot, while the expenses are charged on all the property per foot, equally.

For a long time past it has been the custom to assess all expenses for work and for making assessments, alike equally upon all the owners, per foot. I believe this mode of assessment was first adopted in grading the Tenth avenue, more than thirty years since, and has in most instances been followed since that time. The reason of the charge in the avenue was that a large mass of rock had

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to be removed, and preparing the avenue for travel was an equal benefit to all the owners alike.

If that rule had been adopted in this case, it would have been within the discretion of the assessors, who are to make the assessment according to the amount of benefit each lot receives from the improvement. It must be remembered that although the street directly in front of the lot may not require much expense to bring it to the grade, still the lot may be very much benefited by the grading beyond it; and the assessors are to judge of the extent of such benefit.

There is no wrong done, or irregularity committed, in making that assessment; nor is the objection that more than one lot is included in one assessment any ground for vacating the same. The numbers are given both for ward and street, and the amount for all included in one sum.

Provision is made for apportioning this amount on each lot if necessary; and although it would be better to assess each lot by itself, yet when the same person owns the whole, no injury can be sustained by putting them together. There is no allegation that the petitioner is not the owner of all.

No good reason is shown for interfering with this assessment.

Application denied.

[NEW YORK SPECIAL TERM, April 4, 1870. *Ingraham*, Justice.]

MARSHALL vs. GRAY.

An action for fraud and deceit on the sale of a horse, by means of false and fraudulent representations, made with knowledge of their falsity and with intent to deceive, cannot be maintained without proof of a *scienter*.

When a person, on a sale or exchange of property, *warrants* it, in any particular, he is accountable to the extent of the warranty, whether he knew the fact or not; but where the claim is for *fraud*, the representations must not only be false, but false to the knowledge of the party making them.

The cases of *Bennett v. Judson*, (21 N. Y. Rep. 238,) and *Craig v. Ward*, (36 Barb. 377,) have not established a different rule from the above.

APPEAL from a judgment of the county court of Montgomery county, affirming a judgment rendered by a justice of the peace.

The complaint in the justice's court was for fraud alleged to have been committed by the defendant on the sale of a mare. It averred that the defendant did wrongfully, falsely and fraudulently, and with intent to deceive the plaintiff, represent said mare to be ten or twelve years old, which representation induced the plaintiff to purchase said mare; when in truth and in fact said mare was, at the time, more than twenty-five years old; which fact the defendant well knew. The answer was a general denial. The justice rendered a judgment of nonsuit, on the ground that the plaintiff had failed to make out a cause of action, he having shown no *scienter*. On appeal to the county court the judgment was affirmed, and the plaintiff thereupon appealed to this court.

Wagner & Lewis, for the plaintiff.

J. D. Wendell, for the defendant.

By the Court, BOCKES, J. The action was unmistakably in fraud. The complaint charged, as the gist of the action, false and fraudulent representations, made with intent to deceive; and averred guilty knowledge on the part of the

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defendant. There was no evidence whatever, of such guilty knowledge; and the question here is, simply, whether this was necessary to be proved, in order to establish a cause of action in fraud.

It seems to me the question is not an open one. The rule has been settled, almost from time immemorial, that when a person, on a sale or exchange, warrants property in any particular, he is bound to accountability to the extent of the warranty, whether he knew the fact or not. Not so, however, if a claim for fraud be made. Then the representations must not only be false, but false to the knowledge of the party making them. (53 *Barb.* 425. 6 *id.* 557-563. 11 *Wend.* 108. 8 *Exch.* 731-735. 2 *Barb.* 820. 14 *Mees & Wels.* 651. 1 *Barb.* 606, 607. 7 *Bing.* 103. 6 *id.* 396. 18 *Pick.* 95-109. 6 *Vesey*, 173. *Story's Eq.* §§ 191, 192, 193.) It is supposed that the case of *Bennett v. Judson*, (21 *N. Y. Rep.* 238,) and that of *Craig v. Ward*, (36 *Barb.* 377,) have established a different rule, but an analysis of those cases will show this to be a mistake. These cases proceed on the ground that a fraudulent design must be averred and proved, to establish a right of action for deceit. In *Bennett v. Judson*, fraudulent intent was shown to exist. Judge Comstock says: "These statements were so minutely descriptive of the land, that on their face they clearly imported a knowledge of the fact, on the part of the person making them." The remarks of Johnson, J., in *Craig v. Ward*, were based on the decision in *Bennett v. Judson*. All the cases make the distinction between fraudulent representations and those which are merely false. While the former give the right of action for deceit, the latter do not. If a person, with intent to deceive and defraud, assert a fact as existing of his own knowledge, when he has no knowledge on the subject, he is liable to the party injured by the falsehood. In that case there is guilty knowledge; for he claims to know, and asserts what he does not know.

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The distinguishing feature between warranty and fraud is, in general, guilty knowledge of the falsity of the representations on the part of the party making it. Let this distinction be obliterated, and every breach of warranty becomes a fraud, when the warranty consists in mere representations or assertions of facts. Fraud implies deceit or artifice. This cannot be predicated upon the mere assertion of that which is untrue, with no intent to deceive, or knowledge of its falsity. In the case at bar, there was no evidence of guilty knowledge on the part of the defendant—no evidence of fraudulent intent. The nonsuit, therefore, was properly granted. Nor was there any evidence on this point excluded to the plaintiff's injury.

The judgment of the county court should be affirmed, with costs.

[SCHENECTADY GENERAL TERM, April 5, 1870. *Potter, Rosekrans, Bockes and James*, Justices.]

CLARK vs. WISE and HORTON.

In deciding cases submitted under section 372 of the Code, the court is to draw from the facts stated such conclusions as a jury would be warranted in drawing, if the case was on trial before them. *MORGAN, J.*, dissented.

Cases may arise in which a sale, by an insolvent debtor, of all his property, upon credit, may not be fraudulent. But, as a general proposition, such a sale, to a purchaser cognizant of the vendor's insolvency, is fraudulent; the necessary effect of it being to hinder and delay creditors.

THIS was a case submitted to the court, without action, under section 372 of the Code of Procedure.

The defendant Peter A. Wise, manufacturer of hay elevators and forks at Stockbridge, N. Y., having become insolvent and unable to pay his debts, sold all his stock in trade and real estate and personal property, except such as is exempt from execution, to the defendant Henry Horton, for the consideration of \$10,962.21; that being its full

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value. Horton was liable, as first indorser on two of Wise's notes, for \$892.53. In the transaction, Wise handed over \$859 in money, to enable Horton to pay the notes, and Horton, after deducting the amount of his indorsement, gave back to Wise his own notes for the remainder of the purchase price, one third payable in six months, one third in twelve months, and the residue in eighteen months, without interest. The real estate amounted in value to \$1000. Horton's notes were perfectly good, and it was admitted that he had no actual intent, on his own part, to defraud the creditors of Wise.

This sale was on the 20th day of July, 1869, and on the 6th day of August, 1869, the plaintiff, Erastus W. Clark, obtained a judgment against Wise, in the Supreme Court, for \$369.02, upon a cause of action which accrued May 5th, 1869, and upon which an execution was duly issued and returned wholly unsatisfied. Horton knew of Wise's insolvency when he made the purchase. It was also admitted that Wise, afterwards, fraudulently concealed and misappropriated a portion of the notes to his own use. The question submitted was whether the sale by Wise was fraudulent and void, as against the plaintiff and the other creditors of Wise, within the meaning of the statute.

Edwin T. Risley, for the plaintiff.

Irving G. Vann, for the defendants.

MULLIN, J. In deciding cases submitted under section 372 of the Code, the court is to draw from the facts stated, such conclusions as a jury would be warranted in drawing, if the case was on trial before them.

Cases may arise in which a sale by an insolvent debtor of all his property, upon credit, may not be fraudulent. But, as a general proposition, such a sale, to a purchaser

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cognizant of the vendor's insolvency, is fraudulent, as the necessary effect of it is to hinder and delay creditors.

If a failing debtor may sell on a credit of one, two or three years, why not on a credit of four, six or eight years? Who is to say that one term of credit is honest and fair, and the other fraudulent? Who shall draw the line between sales on credit that do, and such as do not, hinder and delay creditors? If any term of credit is allowed, the parties must in every case go before a court and jury, in order to have its validity determined. Aside altogether from authority, the public interest is promoted by declaring all such sales fraudulent.

There seems to be a conflict of opinion in the Supreme Court on the question. But I think the weight of authority in that court is against the validity of such sales.

It would seem that the Court of Appeals have decided the very question, in *Mott v. Shapely*, cited by the plaintiff's counsel. If that case holds, as it is said by counsel that it does, it is decisive of the question.

The cases in the 31st and 34th *N. Y. Reports* merely hold that the question of fraud, in such cases, is one of fact for the jury, and not of law for the court. Neither holds that if the jury, on the evidence, had found the sale fraudulent, the finding would have been disturbed by the court.

The plaintiff should have judgment declaring the sale fraudulent, appointing a receiver, and for payment of the judgment from the proceeds of the goods.

DOOLITTLE, J., concurred.

MORGAN, J., (dissenting.) In my opinion, the facts contained in the statement submitted do not render the sale fraudulent in law. The transaction will admit of an honest interpretation; and in that class of cases the question

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is one of fact to be submitted to the jury, or to the court, if the trial is by the court without a jury.

Nothing is said in the statement of facts, as to the intention of Wise. The fact that he afterwards fraudulently concealed and appropriated some of the notes to his own use, may be pertinent evidence to submit to the jury, to prove his original fraudulent intention, but it is not necessarily inconsistent with an original purpose on his part to convert the notes into money and pay his debts with the proceeds.

We ought not to give a construction to the statute of frauds which will interfere with sales when the debtor obtains a fair price for his goods, and takes securities readily convertible into money; unless the evidence shows that it was his object to convert the securities to his own use, instead of paying his creditors. The fact that he afterwards converted them to his own use, and omitted to convert them into money to pay his debts, as they matured, would doubtless authorize the conclusion, without a satisfactory explanation, that he originally intended to defraud his creditors; but such a conclusion would be one of fact, to be derived from all the circumstances of the transaction, and not a conclusion of law, to be pronounced by the court.

When the transfer is in writing, and the terms of it will admit of but one interpretation, and that a fraudulent one, the court may pronounce the transfer fraudulent, as a question of law. (*Edgell v. Hunt*, 9 N. Y. Rep. 213.) This, however, has been denied by several judges, and may perhaps be still open to further discussion and review. (See *Griswold v. Sheldon*, 4 Comst. 583; *Mathews v. Rice*, 31 N. Y. Rep. 460, per *Wright, J.*; and *Edgell v. Hunt*, *supra*.)

But when the transfer will admit of an honest interpretation, like the case at bar, the mere fact that the debtor took notes on time, in payment for the goods sold,

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will not of itself be sufficient to make the sale fraudulent in law.

The case is not a proper one for this court to base a final judgment upon, as between these parties. We are not asked to pass upon it as a *matter of fact*; and yet in my opinion it is a question which can only be determined as a question of fact, in view of all the circumstances attending the transaction, taken in connection with the subsequent contract of the parties.

The submission, under section 372 of the Code, should present only questions of law. I think this submission is not authorized by that section, and we cannot with propriety order judgment either for the plaintiff or defendant, as it involves simply a question of fact.

But if we are authorized to pass upon questions of fact, we should be put in possession of the evidence which is relied upon to prove the facts. And in a case of alleged fraud in the sale of property, all the circumstances attending the transaction should be set out in detail, before we can safely pronounce a judgment.

In my opinion the case should be dismissed, without costs to either party.

Judgment for the plaintiff.

[ONONDAGA GENERAL TERM, April 5, 1870. *Mullin, Morgan, and Doelittle*, Justices.]

ELIZABETH CAGGER, administratrix, &c., of Peter Cagger,
deceased, vs. MARTINUS LANSING.

The plaintiff's testator, having an outstanding title to a farm, alienable to the defendant or any one else, an agreement of sale was made, between him and the defendant, by which the defendant was to pay, for such farm, \$5000. He then paid thereon \$4000, leaving \$1000 unpaid, which he agreed to pay within a few days. There was no other writing, between the parties, than a deed of the premises, subscribed by the vendor and his wife and acknowledged, which, by the consent of the parties, was left with a third person, as an escrow, to be delivered to the defendant when he should pay the remaining \$1000.

- Held* 1. That the agreement was not void by the statute of frauds because not in writing and signed by the parties. That it was the agreement of the parties, in writing, and subscribed by the party by whom it was made.
2. That an averment of the defendant's agreement or promise to pay the balance of the purchase money was sufficient to sustain an action therefor, without any allegation of the absolute delivery of the deed, or demand of the balance of the consideration, upon such delivery and acceptance.
3. That the delivery of the deed as an escrow, was, under the circumstances, a sufficient delivery not only to avoid the statute of frauds, but to estop the defendant from availing himself of it as a defense.
4. That the agreement having been performed on the part of the vendor, but not performed on the part of the purchaser, an action at law would lie upon the express promise to pay the consideration, or upon a promise implied in law.

An objection to a deed that it is not stamped as required by the act of congress, is unavailing, unless the party objecting proves that the omission of stamps was with intent to evade the statute. The proof lies with him.

The effect of a deed delivered as an escrow as a conveyance, and its effect as being the written evidence of a contract between the parties to avoid the statute of frauds, should not be confounded. The questions are not identical. *Per* POTTER, J.

Where a purchaser of land, after paying a portion of the consideration and promising to pay the rest, fails to do so, he cannot, on being sued for the balance of the consideration, set up his own breach of promise as a defense to the action, in this, that because he did not perform, the statute of frauds applies; where he, by reason of the performance by the vendor of everything on his part agreed to be performed, is in possession, and is enjoying the benefits of the estate purchased.

THIS action was brought to recover \$1000, the balance of the consideration money for the purchase of the interest of the plaintiff's intestate in a farm in Greenbush, in

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the county of Rensselaer. It appeared from the undisputed evidence on the trial, at the circuit, that one Peter W. Witbeck had once held the premises in question, under a lease from Stephen Van Rensselaer, reserving certain perpetual rents, with right of reëntury for non-payment. That Stephen Van Rensselaer, deceased, devised his interest to his son, William P. Van Rensselaer, who had commenced an action of ejectment to recover possession of the lands, for non-payment of rent under the lease. While the suit was pending, William P. Van Rensselaer conveyed his interest to James Kidd and Peter Cagger, and afterwards, in December, 1864, Kidd transferred his interest to Peter Cagger. In the then pending action, the defendant, who had been in possession, was ejected, and Cagger had judgment for possession.

While things remained in this condition, the defendant, by himself and attorneys and agents, commenced negotiations to purchase out Cagger's right, and on the 19th October, 1865, Cagger and the defendant met, and agreed as follows: Cagger was to convey his interest in the premises to the defendant for the sum of \$5000, and Cagger executed a deed by himself and wife, conveying to the defendant all his (Cagger's) interest in said farm. This deed was present at this interview between the parties. The defendant then paid down \$4000 of the consideration, and asked for a few days' time to pay the remaining \$1000. This was consented to by Cagger. The deed was then, by agreement between the parties, handed to Dr. Obadiah E. Lansing, a brother of the defendant, to be handed to the defendant when he should pay the remaining \$1000. The defendant failed to pay this \$1000, and this action was brought to recover that sum, with interest.

Various objections and exceptions to the decisions and rulings of the court were taken on the trial, not necessary to be stated in this place.

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S. Hand, for the plaintiff.

A. Bingham, for the defendant.

By the Court, POTTER, J. On the trial the plaintiff proved, by sufficient evidence, that her testator had an estate in the farm in question on the 19th day of October, 1865, that was alienable ; and that the defendant had no title thereto, unless it was a present possession.

There was, *prima facie*, upon the evidence, an absolute title in Peter Cagger, by virtue of the judgment proved. This judgment against the defendant could not be impeached or impaired, collaterally, by the defendant, on the trial in this case. Under any claim of the defendant, set up, or claimed to be set up on the trial, Cagger had an outstanding title, alienable to the defendant, or any body else, sufficient to constitute a good consideration, upon a sale. By the evidence, an agreement of sale was made between Cagger and the defendant, in October, 1865, by which agreement the defendant was to pay for the said farm \$5000, and did actually pay thereon \$4000 ; leaving \$1000 unpaid, which he agreed to pay within a few days, and which he has not paid, and this action is brought therefor. Of these facts there is no controversy, by the evidence. This agreement was made on the 19th day of October, 1865. The defendant offered to prove, by various propositions, that there had been previous negotiations between the agents of the parties, and the character and terms of those negotiations, which, on objection, were overruled, and, I think, correctly ; as, in law, they were merged in the final agreement. If they *differed* from the final agreement, it was right to reject them ; if they were identical, it was immaterial to prove them. We have already, in effect, said that the character of the defendant's possession, prior to the period when the judgment settled the rights between the parties, was properly excluded, and it appeared

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in evidence that the defendant, at the time of the agreement, was in possession only under the title claimed by Cagger.

But the defendant has raised some objections upon the law, arising upon the facts above stated, and also upon such facts as will hereafter appear, to the plaintiff's right to recover; among these is:

First. That the contract was void by the statute of frauds, because not in writing and signed by the parties. There was no other writing in this case between the parties than a deed of the premises, which was subscribed by the vendor and wife, and fully acknowledged by them, to the form of which no objection was made at the time, which implies approval; and which deed, by the consent of the parties, was left with one Obadiah E. Lansing, a brother of the defendant, as an escrow, as it was called, to be delivered to the defendant when he should pay the remaining \$1000. The statute, "Of fraudulent conveyances and contracts relative to lands," (2 R. S. 134, 135, §§ 6, 8,) is too familiar to require transcribing. By section 6, no estate or interest in lands, other than leases for a term not exceeding one year, can be created, granted, assigned, surrendered or declared, unless by operation of law, or by a deed or conveyance in writing subscribed by the party creating, granting, surrendering or declaring the same," &c. And by the 8th section, all such contracts are declared void, unless the contract, or some note or memorandum thereof, expressing the consideration, be in writing, and be subscribed by the party by whom it is to be made.

Here the contract, the memorandum of which was in the form of a deed, was in writing, and was subscribed by the party by whom it was made, and upon that contract \$4000 was paid by the defendant. If this was a contract, or the memorandum of one, then the requirements of the statute are complied with. It is insisted that this was not

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a contract, because it never took effect by delivery; that it could only be what it purported to be, a deed or conveyance; which can only take effect upon delivery; and that a deed delivered as an escrow does not take effect until the condition is performed, and the deed delivered over to the grantee. In the examination of these questions we must be careful not to confound the effect of a deed delivered as an escrow as a conveyance, and its effect as being the written evidence of a contract between the parties to avoid the statute of frauds. The questions are not identical. An executory contract, less than a conveyance of title, is good against the statute of frauds; and such a contract delivered as an escrow, might save it, as an agreement, from the effect of that statute. It does appear, by the evidence, that the written deed between these parties is a fair memorandum of the agreement by them made on the 19th October, 1865. It was made by the grantor, to the grantee; it was present at their interview; neither raised an objection to it; it was to be the conveyance between the parties; this was the agreement of both on that day; the brother of the defendant was to hold this agreement for the defendant; it was left with him certainly, for the performance of a condition, but it was a condition to be performed by the defendant; Cagger had nothing further to perform on his part. The only act left unperformed was that of the defendant's paying this sum of \$1000. It would then be a consummated agreement by both parties. I cannot regard this agreement as one affected by the statute of frauds. It was the agreement of the parties, in writing, and subscribed by the party by whom it was made.

Second. It is also urged, that this action is upon an executory contract of sale, and not a promise to pay for land upon the acceptance of a deed, and that therefore the plaintiff cannot recover in this *form* of action. This is not technically correct. It would doubtless be a good

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complaint upon an executory contract; but it is neither alleged, or proved, to be such. The judgment in the case is in accordance with the proof. The complaint, it is true, is somewhat anomalous, and so are the facts to sustain it. The one, perhaps, not more so than the other. Under the present system of pleading, after judgment, in view of substantial justice, the courts will disregard such informalities in the pleadings as that complained of. The plaintiff's complaint could not, perhaps, have truthfully alleged the absolute delivery of the deed in question, and then have demanded the balance of the consideration upon such delivery and acceptance. The allegation in the complaint of surrendering up possession of the premises to the defendant, whether proved or not, is immaterial. There is a good consideration alleged and proved, without that. The agreement, or promise to pay the purchase money, was alleged, and this is sufficient to maintain the action.

Third. The delivery of the deed as an escrow, under the circumstances of this case, is, I think, a sufficient delivery, not only to avoid the statute of frauds, but to estop the defendant from availing himself of it as a defense. By whose default is it that the title did not vest in the defendant? Who only has been guilty of the breach of the condition? Not the plaintiff's intestate. He had performed every act that he could perform. He had not promised to do anything more. The only act that could be afterwards performed was to be performed by the defendant. He had promised to perform this act. He did not keep his promise. He was then sued for this breach, and he sets up his own breach of promise as a defense to the action, in this, that because he did not perform, the statute of frauds applies. This he should not be permitted to do. He is in possession of, and is enjoying the benefits of the estate, of which this \$1000 is the consideration, by reason of the full performance by the plain-

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tiff's intestate, of everything on his part agreed to be performed. The defendant has accepted this performance on his part, and is now receiving all the benefits which the agreement on the part of Cagger could confer; and it is not in good faith, it is not good morals or good law, to set up his own breach of promise, and to urge the invalidity of his own agreement as a defense. As was said by BOCKES, J., in *Bennett v. Abrams*, (41 Barb. 619,) "to permit a party to avoid an agreement under such circumstances, on the ground of its invalidity, would be to make the statute of frauds an instrument of fraud, instead of a shield against it." (See also *Malins v. Brown*, 4 N. Y. Rep. 403.)

There are different characteristics in what is called an escrow. An escrow may be general, or may have a special condition or character attached to it. The general rule is, that a deed left as an escrow takes effect from the second delivery, that is, after the condition is performed. But Chan. Kent says this rule does not apply when *justice* requires a resort to a fiction. (4 *Kent's Com.* 454.) "The relation back to the first delivery, so as to give the deed effect from that time, is allowed in cases of necessity, to avoid injury to the operation of the deed from events happening between the first and second delivery." (*Ibid.*) In *Wheelwright v. Wheelwright*, (2 *Mass. Rep.* 452,) Parsons, Ch. J., laid down this rule: "If a grantor deliver any writing as his deed to a third person, to be delivered over by him to the grantee, on some future event, it is the grantor's deed presently; and the third person is a *trustee* of it for the grantee." If, then, that future event was to be controlled by the grantee, who had promised to perform it, and was an act over which the grantor had no power, could the grantee set up the non-performance of the condition, when sued upon his promise? In this case, for the purposes of justice, I think the delivery of the deed might be held to relate back to the day of the agreement,

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so far as Cagger and this estate was concerned, and for the purpose of enforcing the performance of the condition against Lansing. His brother, Obadiah E. Lansing, was a trustee for him. Such a fiction as to call that a delivery would be in furtherance of justice in this case. It was not necessary that the term escrow should have been used by the parties. I do not think it was appropriately so used. It was in this case the creation of a mere trust. The deed was to be left with Obadiah E. Lansing for a few days, to enable the defendant to perform his part of the agreement, and that was all. Cagger had fully performed; no condition on his part to be performed; and he was without power to withdraw the deed.

Where the condition to be performed is the waiting for an event over which neither of the parties has control—such as the determination of a life, or a life estate, or the arrival at a certain age of some person—this is strictly an escrow; the estate would not pass until the second delivery. But where the condition is dependent upon the act of the grantee, and this act is one which in duty, and in law, he is bound to perform, if this is an escrow, it is a special and qualified one. In such a case, if justice demands the performance of the condition, he is estopped from alleging its non-performance. I do not think, however, that the question of escrow, or conditional delivery, is a material question in this case. The action is really to recover for unpaid purchase money of the farm in question. The agreement has been performed on the part of the plaintiff; unperformed on the part of the defendant. An action at law would lie either upon the express promise, or upon a promise implied in law.

Fourth. The objection of the want of sufficient stamps upon the deed, under the decisions that have been cited, I think is not well taken. The following cited cases seem to cover this case: (*Beebe v. Hutton*, 47 Barb. 187; *New Haven Co. v. Quintard*, 6 Abb. N. S. 128 to 143; *Vore-*

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beck v. Roe, 50 Barb. 302; *Tobey v. Chapman*, 13 Allen, 123; *Gerom v. Littlefield*, Id. 127; *Welley v. Robison*, Id. 128; *Carpenter v. Snelling*, 97 Mass. Rep. 452.) The proof lies with the objector; none was offered.

Fifth. The various objections to the admission of evidence by the judge, and refusal to admit, I have examined, and I do not think them well taken. The questions discussed are all that I have regarded as material. I do not think there was any question for the jury. The judgment should be affirmed.

[THIRD DEPARTMENT, GENERAL TERM, at Plattsburgh, July 5, 1870. *Miller*, P. J., and *Potter* and *Parker*, Justices.]



THE FIRST NATIONAL BANK OF WHITEHALL vs. JAMES LAMB
and others.

THE SAME vs. THE SAME.

THE SAME vs. THE SAME.

The statutes of the State of New York against usury do not apply to loans made by national banks organized under the act of congress, passed June 8, 1864, entitled "An act to provide a national currency," &c.

In regard to the express provisions of that act, the federal government has exercised its sovereign power over the law of these institutions; and to that extent its power, and its enactment, is exclusive. The State law penalties have no application to the system.

Although the statute has subjected national banks organized under its provisions to the judicatories of the State, so that as to the form of the action and the proceeding in its courts, the State system of practice is, and must be adopted; the federal government not having in that particular expressly asserted its own power; yet in whatever court the action may be pending, the law prescribed in the express provisions of the act of congress is sovereign and exclusive.

THE plaintiff in each of these actions is a "national bank," organized under the act of congress of June 3d, 1864. The actions are severally upon promissory notes,

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against the makers and indorsers. The defendants all reside within this State, and the notes were made and negotiated in this State. The defense set up was usury, in corruptly taking more than seven per cent per annum for the loan of money, whereby the said notes were void. The judge, at the circuit, held that the State laws against usury did not apply to banks organized under this act of congress. This is the question discussed in the case.

H. Gibson and W. A. Beach, for the plaintiff.

Potter & Tanner and Hughes & Northrup, for the defendants.

By the Court, POTTER, J. Two objections raised in these cases, one relating to the practice on the trial, the other to the sufficiency of proof of the plaintiff's articles of association, have no sufficient merit to require much examination at our hands. The learned judge, on the trial, held that the statutes of the State of New York against usury do not apply to loans made by banks organized under the act of congress passed June 3, 1864, entitled "An act to provide a national currency secured by a pledge of State bonds, and to provide for the circulation and redemption thereof." This ruling of the judge is the only real question arising in this case. Judicial construction of the intent of the national legislature, as to the terms employed in the act referred to, is what the court are called upon to give.

1st. It will be assumed to be a conceded point that it was within the power of congress, under the constitution of the United States, to enact the law in question; and it is perhaps as fully conceded that an act of congress passed under the implied powers of the constitution, has as much potency as one enacted under the express powers of the same instrument. It is equally within the constitu-

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tion, and such implied powers are also as much prohibited to the States, as if they had been expressly forbidden. (*McCulloch v. Maryland*, 4 *Wheat.* 427. *Weston v. City of Charleston*, 2 *Pet.* 467. *Sturges v. Crowninshield*, 4 *Wheat.* 193.) And the constitution itself declares that it, and the laws of the United States which shall be made in pursuance thereof, shall be the supreme law of the land; and the judges of every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding. (*Const. U. S. art. 6.*) It has been adjudged that under the provisions of the constitution, it is in the power of congress, in a class of cases, to confer such jurisdiction, and to institute such proper courts and tribunals, inferior to the Supreme Court, as to secure a harmonious and efficient working of a system of jurisprudence. (*Martin v. Hunter's Lessees*, 1 *Wheat.* 134.) In another class of cases it is held that the several States can exercise legislative power, except in so far as that power is abridged by the federal constitution. (*Sturges v. Crowninshield*, 4 *Wheat.* 192, 193.) In this class the power is concurrent; though this concurrent power does not extend to all cases in which its exercise is not expressly prohibited. And there is still another class of cases, where State laws may be enacted, and remain valid until the same power is exercised by congress; and when this is done, the State law in that respect is suspended in its operation. (*Id.* 196.) The power of creating corporations is a power appertaining to sovereignty. And these powers, under our system, belong to both national and state governments, and are divided between the government of the Union, and those of the States. They are each sovereign with respect to the objects committed to it, and neither is sovereign with respect to the objects committed to the other. (*McCulloch v. Maryland*, 4 *Wheat.* 410.) That the national legislature possessed the full power to legislate in regard to these national banks, and, as to them, to exercise its juris-

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diction in its enactments as to all things *necessary and proper* in order to carry its powers into execution; and to regulate the exercise of such powers by such conditions, upon such considerations and by such rules and penalties as to prevent extortion, is a proposition too self-evident to require argument. In this respect the national legislature is unlimited. It was acting within its legitimate sphere, under the implied powers of the federal constitution, which was ordained and established by the people themselves, and for their own government. Therefore, an act of congress passed in pursuance of clear authority, under the constitution, is the supreme law of the land. (*United States v. Hart, Peters C. C. Rep.* 390.) The act in question was an appropriate means, plainly adapted to the end, of exercising the express powers of the national constitution; and the degree of its necessity was a question of legislative discretion, and not of judicial cognizance. '(4 *Wheat.* 316.)

The discussion in this case, then, is limited to this single question: Do the usury laws of the State of New York apply to notes discounted by these national banks? The 8th section of the act of congress gave them authority "by their name, to make contracts, to sue and be sued, complain and defend in any court of law or equity, as fully as natural persons." This power gave them the right to sue in the state courts upon the obligations in this action. Then may the usury laws of the State, which make void contracts tainted with usury, as defined by the law of this State, be interposed as a total defense in an action upon such notes? The 30th section of the act of congress authorizes them to take interest on such notes at the rate allowed by the laws of this State; and such interest may be taken in advance, reckoning the days for which the note has to run. It then prescribes the penalties for taking an excess of interest, in the following terms: "And the knowingly taking, receiving, reserving or charging a rate of interest greater than aforesaid shall be held

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and adjudged a forfeiture of the entire interest which the note * * carries with it, or which has been agreed to be paid thereon. And in case a greater rate of interest has been paid, the person or persons paying the same, or their legal representatives, may recover back in any action of debt, twice the amount of interest thus paid, from the association taking or receiving the same; provided that such action is commenced within two years from the time the usurious transaction occurred." Are the defendants confined to the remedy conferred by this act? May the penalties prescribed by the statutes of this State be set up as a defense? Are the penalties in the act of congress merely cumulative to those of the State? In other words, what was the intent of congress in this regard? These are only different methods of stating the same question. The answer to one is the answer to all.

The *intent* of congress must be determined from reason, and from established rules of construction, in analogous cases. Puffendorf says: "That which helps us most in the discovery of the true meaning of the law, is the reason of it, or the cause which moved the legislature to enact it."

If the penalties given by the act of congress are cumulative, leaving the state law also in force, the penalties in the former would probably never be set up as a defense; the latter being a defense to the whole contract, principal and interest, while the former goes only to the interest. So if both are in force, the state law can first be used to defeat the entire recovery upon the contract, which is thereby made void; and by the law of congress there would be superadded, by way of further penalty, the liability to have recovered back twice the amount of the interest that had been paid. I do not think it reasonable to suppose that congress intended to add to the penalties existing by the state law. That was no part of the reason for its enactment, and therefore the law of congress is not

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cumulative. Vattel, in his rules of construction of statutes, says "that everything that contains a penalty is odious, with respect to laws; therefore judges should be inclined, in giving them construction, to take the merciful view, and presume against giving interpretation in favor of the penalty." (*Rule 29.*) And Grotius lays down the rule that if it be necessary, to avoid injustice, to take words in their strictest sense, we ought to stop at the narrowest limits of their signification.

But I think the question here is strictly one of legislative intent. The rule laid down by the Court of Appeals, in *Dudley v. Mayhew*, (3 *N. Y. Rep.* 15,) is doubtless the true rule; "that where a statute confers a right, and prescribes an adequate means for protecting it, the proprietor is confined to the statute remedy." All other remedies, in such case, are excluded. And also *Behan v. The People*, (17 *N. Y. Rep.* 517,) "that where an *act* is prohibited by a statute, which is not criminal at common law, the legislature having fixed the penalty in the prohibiting act, designed that there should be no other punishment." In the case of *Smith v. Lockwood*, (13 *Barb.* 217,) it was held that where a new right or means of acquiring it is conferred, and an adequate remedy given for its invasion, in the same statute, the parties injured are confined to the statutory redress. To the same effect is *Renwick v. Morris*, (7 *Hill*, 575;) *Bassett v. Carleton*, (32 *Maine R.* 553;) *Andover Turnpike Co. v. Gould*, (6 *Mass. R.* 43;) *Franklin Glass Co. v. White*, (14 *id.* 286;) 5 *John.* 175.

It was said in *Houston v. Moore*, (5 *Wheat.* 23:) "The people would have reason to complain of the exercise of the same powers by congress, and at the same time by the state legislatures. To subject them to the operation of two laws upon the same subject, dictated by distinct wills, particularly in a case inflicting pains and penalties, is, to my apprehension, something very like oppression, if not worse. In short, I am altogether incapable of compre-

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hending how two distinct wills can, at the same time, be exercised in relation to the same subject, to be effectual, and at the same time compatible with each other."

Judge Story, in his commentaries on the constitution, says, (§§ 439, 440,) "If there be a conflict between the laws of the Union and the laws of the State, the former being supreme, the latter must of course yield." He says: "It is an axiom, if power is given to create a thing, it implies a power to preserve it. A power to destroy, if wielded by a different hand, is hostile to, and incompatible with, this power to create and preserve. Where this repugnancy exists, the authority which is supreme must control, and not yield to that over which it is supreme. Consequently the inferior power becomes a nullity."

The act of congress in question is the only statute in existence, on that subject, enacted by the federal legislature; it cannot therefore be said to be in *pari materia* with any other statute. The statutes passed by legislatures under other governments have no influence or control over this; and its construction is not controlled by them. It is to be construed by itself. It is repugnant to the provisions of no statute enacted by the same government; and if repugnant to statutes under another government, it in nowise affects this. Other governments have no power to enact statutes which can limit or control the absolute, supreme and sovereign power of this government. Congress has not in this attempted to repeal or interfere with the statutes of the State of New York on the subject of usury, and have not the direct power to do so, should they attempt it. Nor has congress, either in terms or by implication, adopted the statute law of New York, or its penalties, on this subject. With its own unrestrained power to legislate on this subject, it has matured its own independent project of governmental agencies, which stands alone as a single, separate and distinct system of banking and agency, unaided by, and disconnected

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with, other systems. It has conferred benefits upon the corporators themselves and perhaps upon the public; and in consideration thereof has demanded and received in return, from these agencies, therefor, various and onerous duties, aids, securities and credits to the government, and from the institutions so authorized. These are to be regarded as fair and equal equivalents, with mutual considerations passing from the one to the other. The government was authorized to employ them as depositories of the public moneys, and as financial agents of the government, and their supervision was committed to an agent of the federal government. The institutions were bound to deposit securities for the government's protection, and also to keep deposits and accumulate a surplus fund for that purpose.

It has, in this system, permitted the institutions to receive a fixed and fair equivalent, to be received for loans and discounts to individuals, of money upon notes and bills of exchange, and at the same time has thrown its protecting influences over such individuals to prevent abuse and oppression (as it must be supposed) by adequate penalties to be inflicted for violations of the statute. In other words, for the value to the corporators of chartered rights and privileges conferred, the government imposed certain burthens upon these agencies as a condition to the grant; and the conferring and receiving of these reciprocal benefits, with these duties and burthens and subject to its penalties, are the terms, and these only, of the compact between the government and the corporators in these institutions. "No other burthens are annexed to the enjoyment of the rights and privileges conferred by this act of congress." (3 *Wallace*, 583.)

To this extent, that is as to the express provisions of this act, the federal government has exercised its sovereign power over the law of these institutions; and to this extent its power, and its enactment, is exclusive. The

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State law penalties have no application to this system. True, the statute has subjected these institutions to the judicatories of the State, so that as to the form of the action and the proceeding in its courts, the State system of practice is, and must be adopted. In this particular, the federal government has not expressly asserted its own power, nor is it necessary here to inquire whether the courts of the general and state governments have concurrent jurisdiction; but it follows that in whatever court the action may be pending, the law prescribed in the express provisions of the act of congress is sovereign and exclusive; and it must be so declared.

If the view we have taken of this case is a sound exposition of the law of congress, it is not necessary to discuss another and a distinct question, greatly dwelt upon, on the argument, as to the right of the state governments to tax these banks or their stockholders, and to whom and to what extent the power of taxation belongs; whether congress and the states possess concurrent authority on the subject; whether if the power is exercised by congress is paramount; and whether by its exercise it is then exclusive; or if, when congress omits or withholds its right to act in that regard, the states can exercise full power to tax, and as it is said, to destroy thereby; we are not called upon to declare. This greatly vexed question of the taxing power is distinct from the question before us, and depends in some respects upon an entirely different basis or provision of constitutional law.

The result of our view of the law of these cases is, that the judgments must be affirmed.

[WARREN GENERAL TERM, July 12, 1870. *Rosekrans, Potter, Boockes and James*, Justices.]

JOHN A. DE BEMER, receiver &c. vs. DANIEL DREW.

Where, in an action against a foreign corporation, the corporation appears, by its attorney, and thus submits itself to the jurisdiction of the court, and by the result of the action of the court such corporation becomes the judgment debtor of the plaintiff in the action, this gives the court power over its property and rights of action within this State, and brings the corporation as much within the jurisdiction of the court as if it were a corporation under the laws of this State.

The fact that it is a foreign corporation does not relieve it from the status of being a "judgment debtor," nor from the provisions contained in the 2d and 3d subdivisions of section 224 of the Code, relating to "provisional remedies," which apply, in general terms, to all judgment debtors, when an execution has been returned unsatisfied and the judgment debtor refuses to apply his property in satisfaction of the judgment.

The statute, being general in its terms, embracing all "judgment debtors," it is but a fair and reasonable construction to be given to it as a remedial statute, that it includes all persons. Corporations are not excepted, in terms, and ought not to be in practice.

It is a universal rule with a court of equity never to permit injustice to be done, or a wrong to go unredressed upon mere technical objections, if the court has jurisdiction of the subject matter and of the parties; especially if such injustice lies in the way of the enforcement by the court of its own judgment.

When a court of equity obtains jurisdiction of an action for any purpose for which it is authorized to give judgment, it holds such jurisdiction for every other purpose; especially for the purpose of giving effect to its judgment.

Hence, if the court has obtained jurisdiction of an action against a foreign corporation by its appearance by attorney, it has power, after judgment rendered in such action and execution returned unsatisfied, to appoint a receiver of the property and effects of the corporation.

Where a foreign corporation had never filed in the office of the Secretary of State any designation of a person upon whom papers could be served, and there was evidence of its insolvency or refusal to pay its judgment debts; and it had discontinued its organization and the exercise of its franchises; had neglected to hold meetings of its officers; had sold out to another company its property, and its officers had become officers in the new company, its president becoming the president of the new company, and having the avails of the sale of the property of such corporation in his possession; *Held* that these facts, alone, would justify the appointment of a receiver, even *ex parte*.

Where a foreign corporation, sued in this court, appears by attorney, a notice of the appointment of a receiver of such corporation, served upon the attorney, is good service.

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APPEAL from an order made at a special term, overruling a demurrer to the complaint.

The complaint alleges that the New Jersey Steam Navigation Company is a corporation organized under the statutes of New Jersey, and were engaged as common carriers between the cities of New York and Troy, in this State; that as such carriers they undertook to carry the baggage of one Christopher Fick from New York to Troy; that they lost his said baggage, and neglected to pay him the value thereof; that he afterwards recovered a judgment against the said corporation therefor, which judgment was duly entered and perfected in Schenectady county, in this State, in which action the said corporation appeared by its attorney; that the judgment remains in full force. That in November, 1867, an execution was issued upon said judgment, to the sheriff of the city and county of New York, in which county the said company had its place of business, and that the said sheriff duly returned the said writ wholly unsatisfied, being unable to find any property of the company to satisfy the same. That afterwards, in August, 1868, the said Fick caused a notice to be served on the said company, by serving the same on the attorney of the said company, who appeared in the action, and upon the defendant, Daniel Drew, who was the last president of the said company known to said Fick, which notice informed the said company and its attorney and president, of the issuing, and the return unsatisfied, of the said execution; and said notice also contained a demand upon the said company and its president and attorney, that it should forthwith apply its property, or so much thereof as should be necessary, to the satisfaction of said judgment; that no compliance was made with such demand, and that on the 3d of October, 1868, an order was obtained at a special term of the Supreme Court, held at Schenectady, upon affidavits stating, among other things, the facts above men-

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tioned, and also that the company had never filed any designation of any person upon whom papers or process could be served, in the office of the Secretary of State; that there was at least one other judgment against said company, upon which execution had been issued and returned wholly unsatisfied; that said company had never continued its organization, or to exercise its franchises; had neglected to hold any meeting of its officers, and that there were no officers left to manage its affairs, except such as might be holding over from a term long expired. That said order to show cause was made returnable at a special term to be held at Schenectady on the 10th day of October, 1868; and the said order also required the said company to show cause why a receiver of its property should not be appointed; that said order and affidavits were duly served upon the said attorney, pursuant to the directions of said order. That said special term, on the day last mentioned, by its order appointed the plaintiff the receiver of all the property of the said company, both legal and equitable; that said receiver immediately duly qualified and gave security, as required by said order, and now is, and was, and since the 10th day of October, 1868, hath been, such receiver, and was vested with all the title of its property, and was entitled to the possession thereof; and that afterward, and before the 3d of March, 1869, the said order, so appointing him receiver, was duly served on both the said attorney and the defendant in this action, who then was president of said company, as aforesaid, and that no other person has ever since been elected president thereof.

The plaintiff further alleged, upon information and belief, that for several years prior to December, 1864, the said company owned large amounts of property of divers kinds, and among other things the whole or a large interest in two vessels, one being the *Francis Skiddy*; that the said company, through the defendant, then its agent and

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principal officer, in the fall of 1864, sold to another company such of its property as then remained, and the defendant became and was the president, or one of the principal officers of said new company; and that by means of the sale, the defendant received large amounts of money or property, for the property so sold to the said new company, which, or the avails of which, he now has; and that he is largely indebted to the New Jersey Steam Navigation Company therefor; that he was, also, a large stockholder in said last named company. That the plaintiff, since his appointment as receiver, has caused demand to be made upon the defendant that he deliver to the plaintiff all the property, or the avails thereof, in his hands, or under his control, which was of the first mentioned company; but that he has neglected and refused, and now neglects and refuses, to do so. The plaintiff demands that the defendant be ordered and required to account to the plaintiff for the property which was of the said New Jersey Steam Navigation Company at the close of the business of 1864, and particularly of that which came into his hands; and that he may be compelled to deliver the same, or the avails thereof, or pay its value to the plaintiff; and that the plaintiff may have judgment for such delivery or for the value thereof.

The defendant demurred to the complaint, specifying two grounds of demurrer: 1st. That the plaintiff has not legal capacity to sue. 2d. That the complaint does not state facts to constitute a cause of action.

J. L. Hill, for the plaintiff.

Charles Jones for the defendant.

By the Court, POTTER, J. The receiver in this case was appointed in the original action, which was against a foreign corporation, after judgment, and upon proceedings

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supplemental to execution. By chapter 2, title 9, section 292 of the Code, it is provided that when an execution against the judgment debtor, issued to the sheriff of the county where he has a place of business, is returned unsatisfied, in whole or in part, the judgment creditor, at any time after such return made, is entitled to an order from a judge of the court, requiring such judgment debtor to appear and answer concerning his property, &c. Such an order was not made. But section 298 of the same chapter has this additional provision: "The judge may, also, by order, appoint a receiver of the property of the judgment debtor in the same manner, and with like authority, as if the appointment was made by the court according to section 244." Section 244 is in chapter 5, of title 7, of the Code, which treats of "provisional remedies in civil actions," and provides, in subdivision 4 of that section, that in cases after judgment, when a foreign corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights, a receiver may be appointed. Such are the powers conferred by the provisions as to the appointment of receivers for judgment debtors generally, and in cases of foreign corporations. In this respect the Code is a remedial statute, and is to be carried out so as to advance and secure the object of its enactment. This foreign corporation appeared by its attorney in the original action, and thus submitted itself to the jurisdiction of the court of this State, and by the result of the action of the court, the corporation became the judgment debtor of the plaintiff in that action, and this gave the court power over its property and rights of action within this State, and brought it as much within the jurisdiction of the court as if it were a corporation under the laws of this State. (*Dart v. Farmers' Bank of Bridgeport*, 27 Barb. 337, 343.) The fact that it is a foreign corporation, does not relieve it from the status of being a "judgment debtor," nor from the provis-

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ions contained in the second and third subdivisions of section 244, which apply in general terms to all judgment debtors, when, as in this case, an execution has been returned unsatisfied, and the judgment debtor refuses to apply his property in satisfaction of the judgment. The fourth subdivision of section 244 is merely cumulative to the second and third, and includes corporations, domestic and foreign, and the appointment of receivers for them, in the cases provided in the Code, and by the special statutes, either before or after judgment; and being cumulative, does not change the general powers conferred by the second and third subdivisions of the same section, which apply to *all* judgment debtors—when the object of the action is only to carry the judgment of the court into effect. It is a universal rule with a court of equity, never to permit injustice to be done, or a wrong to go unredressed upon mere technical objections, if the court have jurisdiction of the subject matter and of the parties; especially if such injustice lies in the way of the enforcement by the court of its own judgment. No good reason is perceived why a corporation judgment debtor, domestic or foreign, should be permitted to escape the proper execution of a judgment of this court, more than a private individual. The statute being general in its terms, as to all judgment debtors, it is but a fair and reasonable construction to be given to a remedial statute, that it includes all persons. Corporations are not excepted in terms, and ought not to be in practice.

• Even before the Code, there was a statute provision by which the chancellor (now the Supreme Court) was given jurisdiction over directors, managers, and other trustees and officers of corporations; among other things, to compel them to account for their official conduct in the management and disposition of the funds and property committed to their charge, and to decree and compel payment by them to its creditors, of money or property they have ac-

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quired to themselves, or transferred to others. (2 *R. S.* 462, §§ 41, 33; 3 *id.* 762, 5th ed.) True, the court in this State cannot regulate the internal affairs of a foreign corporation, nor enforce any remedy beyond the bounds of the State; they cannot annul or forfeit their charters, but they can, and it is their duty, to provide for the collection of debts against them, when they, or their property within the State, are brought within the jurisdiction of the courts of the State. (*Howell v. Chicago and N. W. Railroad Co.*, 51 *Barb.* 383.) I do not, however, with all my respect for the court whose decision I have cited, concur with them in holding that the provisions of the Code were not intended to extend the power of the court over foreign corporations further than it existed before; but, on the contrary, I think it was expressly intended to give a new and more simple and appropriate method of bringing them in subjection to our laws. Before the Code, foreign corporations could only be proceeded against by attachment against their property for the collection of a debt, or for the redress of a wrong. By the 127th section of the Code, civil actions can now be commenced against them, as against all other persons, by summons, and jurisdiction of them and their property can be obtained by the publication of the summons upon an order of the court, whenever they have property within the State, or when the cause of action arises within the State. (§ 135.) I do not think, as is claimed by the defendant's counsel, that the *only* power possessed by the court to appoint a receiver is conferred by the 224th section of the Code. The court had full and perfect jurisdiction over the defendants, by their appearance in the action by their attorney, and as well by the statutes as by an inherent power which the courts possess, to enforce their own judgments. They can compel the payment of the claim by any of the methods known to a court of equity for that purpose. When a court of equity obtains jurisdiction of an action for any purpose for

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which it is authorized to give judgment, it holds such jurisdiction for every other purpose; but especially for the purpose of giving effect to its judgment. There is, therefore, no force in the objection that the court had no power or jurisdiction to appoint a receiver. If the court erred in a question of practice, in appointing a receiver, while possessing jurisdiction in the action, and of the parties, the appointment is not void; relief can only be obtained in such case, by an appeal, and review directly from the order appointing him; it cannot be taken advantage of collaterally. The cases cited, showing that the better practice in appointing receivers is upon bill filed, are cases before the practice established by the Code, or before the practice, under the Code, was fully established. But if we were at liberty, in this collateral way, to review the order appointing a receiver, the objection that no appointment could be made without notice to the party interested, except in certain extraordinary cases which do not exist in this, is not well taken. First, this comes clearly within the extraordinary class of cases where it is allowed.

The defendant had never filed in the office of the Secretary of State any designation of a person upon whom papers could be served. There was evidence of their insolvency or refusal to pay their judgment debts; they had discontinued their organization and the exercise of their franchises; they had neglected to hold meetings of their officers; they had sold out to another company their property, and the officers of the defendant had become officers in the new company, and one of them, to wit, the president of the defendant had become the president of the new company, and had the avails of the sale of the defendant's property then in his possession. This surely ought to be regarded as an extraordinary and exceptional case, and alone, I think, would justify the appointment of a receiver,

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even *ex parte*. (*Sandford v. Sinclair*, 8 *Paige*, 373. *People v. Norton*, 1 *id.* 17. *Howe v. Deuel*, 43 *Barb.* 508.)

Nor is the objection good, that there was no legal notice of the appointment of receiver given to the party interested. The notice was served upon the attorney of the defendant, who appeared in the action upon which judgment was obtained. In such a case, this was good service. (*Flynn v. Bailey*, 50 *Barb.* 77. *Pitt v. Davison*, 37 *N. Y. Rep.* 235.) In the last case cited this question was fully examined, and the rule then laid down covers this case. It is said: "Where the proceeding is to enforce a civil remedy, the party in default has already had the opportunity of contesting his liability to perform what the proceeding seeks to compel him to perform, and such proceeding, in effect, is but an execution of the judgment against him." "His obligation has been established by the judgment, in regard to which he has been heard, and this proceeding is merely to enforce the fulfillment of that obligation." It is distinguished from a proceeding to punish for criminal contempts, since the statute, and the party should be allowed to regard the attorney as continuing until the satisfaction of the judgment under such proceedings, unless notice of change to the contrary has been given. This ought more especially to be the rule, when the party is a foreign corporation, and when other service is either impossible or difficult. (See *Drury v. Russel*, 27 *How.* 130; and *Lusk v. Hastings*, 1 *Hill*, 660.) If we are right in these views, the plaintiff was properly appointed receiver, has legal capacity to sue, and the complaint is sufficient in its statement of a cause of action. The result is, the order of the special term overruling the demurrer, must be affirmed, with costs.

[SCHENECTADY GENERAL TERM, April 5, 1870. *Potter, Rosekrans, James and Bockes*, Justices.]

THE JOSEPH DIXON CRUCIBLE COMPANY *vs.* THE NEW YORK
CITY STEEL WORKS.

An order denying a motion to strike out a pleading as frivolous cannot be reviewed on appeal.

It is not a substantial right to have it stricken out. On the contrary, it is a matter of discretion with the judge whether it shall be so stricken out or not. Under our present system, if the pleading is not so bad as to show on its face that it is frivolous, no argument should be allowed, and the party should be left to a demurrer.

If a judge improperly holds a pleading to be frivolous, the order is appealable, because the party putting in the pleading loses a right to such a pleading; but the reverse is not true. No right is lost, and the party objecting to its sufficiency may have it set aside, on demurrer.

A pleading, to be frivolous, must show its defects on the first inspection.

A PPEAL from an order refusing to strike out an answer as frivolous.

By the Court, INGRAHAM, P. J. The answer is clearly bad, and if the motion had been granted it would have been difficult to find any good reason for reversing the order. But we do not think an order which denies a motion to strike out a pleading as frivolous, can be reviewed on appeal. It is not a substantial right to have it stricken out. On the contrary, it is a matter of discretion with the judge whether it shall be so stricken out or not.

The practice of allowing counsel to argue in favor of or against such a motion has been permitted, when the rule should be the other way. Under the old system, on an application of this character, no argument was ever allowed. The court, on inspection, would decide whether or not a pleading was frivolous, and if any doubt existed the motion would be denied. So under our present system, if the pleading is not so bad as to show on its face that it is frivolous, no argument should be allowed, and the party should be left to a demurrer. If the judge improperly holds a pleading to be frivolous, the order is appealable, because the party putting in the pleading loses a right to

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such a pleading, but the reverse is not true. No right is lost, and the party objecting to its sufficiency may have it set aside on demurrer. If a party making such a motion cannot satisfy a judge that the pleading is frivolous, even after an argument, he will not be allowed to have a second argument to make out a pleading frivolous, when, according to both the old and present systems, a pleading, to be frivolous, must show its defects on the first inspection. (*See Fillette v. Herman*, 8 Abb. N. S. 193, n.)

Order affirmed, without costs.

[FIRST DEPARTMENT, GENERAL TERM, September 5, 1870. *Ingraham*, P. J., and *Cardozo*, Justice.]

STOVER vs. COGSWELL.

Where a plaintiff has had an opportunity to interpose the defense of fraud and corruption in an arbitrator, in an action brought against him upon the award, an injunction will not be issued to restrain the proceedings in that action, either before or after judgment.

His remedy is to move, in that action, for such relief as the facts may show he ought to have, in respect to the judgment which has passed against him, therein.

APPEAL from an order made at a special term, dissolving an injunction.

By the Court, CARDOZO, J. The plaintiff here had an opportunity to interpose the defense of fraud and corruption which he charges on the arbitrator, in the action brought against him upon the award; and when that is so an injunction should not issue to restrain the proceedings in that suit, either before or after judgment. (*Snediker v. Pearson*, 2 Barb. Ch. 107.) He is not remediless. He can yet move in that action for such relief as the facts

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may show he ought to have against the judgment which has passed against him. If he could not, perhaps another question might be presented which it is not necessary now to consider.

The order should be reversed.

[FIRST DEPARTMENT, GENERAL TERM, September 5, 1870. *Ingraham, P. J.*, and *Cardozo*, Justice.]

THE ERIE RAILWAY COMPANY vs. RAMSEY and others.

An injunction will not be issued to restrain the prosecution of an action pending in the same court, unless it appears from special circumstances, that relief cannot be had by motion or petition in the cause.

This was decided in *Schell v. The Erie Railway Company*, (51 Barb. 368,) and that is all that it was intended by the court to decide, there, viz., that such an injunction is irregular.

When a second motion is based upon a new state of facts arising since the first decision was made, it is not necessary that leave to make the motion should be obtained. It may be made as a matter of right.

APPEALS from an order made at a special term, denying a motion to dissolve an injunction, and from an order refusing to entertain a second motion to dissolve.

By the Court, CARDOZO, J. It is perfectly settled that an injunction will not issue to restrain the prosecution of an action pending in the court, unless it appears from special circumstances that relief cannot be had by motion or petition in the cause. That was decided in *Schell v. The Erie Railway Company*, (51 Barb. 368.) And it may be proper to add, as that case, in consequence, perhaps, of some unnecessary and probably inaccurate expressions in the prevailing opinion, seems to have been misunderstood, that is all that it was intended by the court to decide

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there, viz., that such an injunction is irregular. (*See also Dyckman v. Kernochan*, 2 *Paige Ch.* 26.) The defendants can yet move to dissolve the injunction in the original suit if they desire. The order below must be reversed.

In respect to the appeal from the order refusing to entertain the second motion to dissolve the injunction, because leave to make it had not been previously obtained, it is enough to say that when a second motion is based upon a new state of facts arising since the first decision was made, it is not necessary that leave to make the motion should be obtained. It may be made as a matter of right. The whole practice upon this subject is fully reviewed, and the authorities cited, in *Belmont v. The Erie Railroad Company*, (52 *Barb.* 637.)

That order should also therefore be reversed.

Orders appealed from reversed.

[FIRST DEPARTMENT, GENERAL TERM, September 5, 1870. *Ingraham*, P. J., and *Cardozo*, Justice.]

RAMSEY vs. THE ERIE RAILWAY COMPANY and others.

A motion on the part of defendants, on 12 hours' notice after serving papers at Albany, to vacate a stay of proceedings made at Delhi; and a stay of proceedings served at New York at about 10 o'clock A. M. on the 31st of May, to prevent the making of a motion at Delhi or Binghamton, on that day, cannot be said to be proper and orderly proceedings consistent with a due administration of justice.

To give an order staying proceedings on a motion vitality, it should be served in time to be communicated to the counsel acting at the court where the motion is to be made.

If such counsel takes an order in pursuance of the notice of motion, without any knowledge of a stay of proceedings having been granted, although an order for a stay had about that time been served, in a different city, his proceeding will not be irregular.

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THE defendants noticed a motion to be heard at Delhi, in Delaware county, on the 16th of May, 1870, to change the place of trial. The hearing was adjourned to the 31st of May. The plaintiff then served a notice of a motion for other relief, to be heard on the second Monday of June, and obtained and served an order staying proceedings on the first motion until the second motion was heard. This latter order staying proceedings was served on the 30th of May, 1870. The defendants' attorneys then served, on the evening of the 30th May, an order to show cause the next day, at Binghamton, why the stay of proceedings served that day should not be vacated. The plaintiff not being able to prepare papers and go to Binghamton to oppose said motion, applied to a justice of the Supreme Court, at Albany, and obtained an order, on the same day, staying all proceedings of the defendants upon this motion to change the place of trial, until the hearing of the motion before noticed for the second Monday of June. This order was served on the defendants' attorneys, in New York, on the 31st of May, before 10 o'clock A. M. The defendants' attorneys, on the 31st of May, obtained an order vacating the stay served on the 30th of May, and then another order changing the place of trial. A motion was then made by the plaintiff, at the New York special term, to vacate the order granted changing the place of trial, for irregularity on account of the last stay of proceedings, which motion was denied, and the plaintiff appealed therefrom.

By the Court, INGRAHAM, P. J. It cannot be said that the motion on the part of the defendants to vacate the stay of proceedings made at Delhi, on 12 hours' notice after serving papers at Albany, or that the stay of proceedings served at New York at or about 10 o'clock A. M. on the 31st of May, to prevent the making of the motions at Delhi or Binghamton, were proper and orderly pro-

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ceedings consistent with a due administration of justice. And if we had the power, on this appeal, both should be set aside, and the parties remitted to the hearing of their original motion. But that cannot be done; and the only question that can be raised on this appeal is, whether the defendants were irregular in taking their order to change the place of trial, at Binghamton, without knowledge of the counsel attending to that motion, of any stay of proceedings, although the same had about that time been served in New York. I think his proceeding was not irregular. To give the order staying proceedings vitality, it should have been served in time to be communicated to the counsel acting at the court where the motion was made. This could not be done, as appears by the affidavits on the part of the plaintiff, and the order was therefore sent to New York, and even then was not served until about the hour of making the motion in Binghamton. In *Havens v. Dibble*, (18 *Wend.* 655,) a plea was served on an agent at Geneva on the same day on which a default was entered in New York, after service of the plea. The plaintiff was held to be regular, the court refusing to notice the serving of the plea under the circumstances of that service.

In *Brainard v. Hanford*, (6 *Hill*, 368,) Bronson, J., says: "It may be laid down as a general rule, that where the party waits, and serves a paper on the day when his default for the want of it may be regularly taken, and the default is taken on that day, in good faith, and without knowing of the service, we will not inquire, or take notice of the fact, that the service was at an earlier hour in the day than the taking of the default."

The affidavit on the part of the plaintiff shows that it was impossible to get up the necessary papers between the service of the order to show cause and the departure of the train for Binghamton, to oppose the motion, but they do not show that they could not have sent there in

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time to ask for an adjournment, in order to obtain time to prepare such papers, and there is no reason to suppose that time would not have been granted.

It seems to me, however, that the facts above referred to should have been held sufficient to have allowed a rehearing of the motion on the merits; but the appeal from that part of the order appealed from having been waived by the appellant, we cannot sustain the appeal for that cause.

The order appealed from should be affirmed, but without costs.

[FIRST DEPARTMENT, GENERAL TERM, September 5, 1870. *Ingraham*, P. J., and *Cardozo*, Justice.]

**LEVI COMSTOCK and MARY COMSTOCK, appellants, vs.
GEORGE W. COMSTOCK, executor &c., respondent.**

It is a well settled rule of equity jurisprudence that all gifts, contracts or benefits from a principal to one occupying a fiduciary or confidential relation to him are constructively fraudulent and void.

The court, in such cases, acts upon the principle that if confidence is reposed it must be faithfully acted upon; if influence is acquired it must be kept free from the taint of selfish interest, and conniving and overreaching bargains.

It is for the common security of all mankind that gifts procured by agents, and purchases made by them, from their principals, should be scrutinized with a close and vigilant suspicion. So of notes, bills, contracts, releases and obligations.

Agents are not permitted to deal with their principals, in any case, except upon showing the most entire good faith, a full disclosure of all the facts and circumstances attending the transaction, and an absence of all undue influence or imposition.

Transactions which would be held unobjectionable between other parties are often declared void, if between persons occupying confidential relations.

Per JAMES, J.

Where the relation of principal and agent existed between the parties to a note, receipt and contract, strengthened by the further and other relation of parent and child; and the parent, who was alleged to have executed the

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papers, was old and feeble, being at least seventy-seven years of age when the first bore date, and living with her son, the other party to instruments, which were in his handwriting, and for his benefit; no object, benefit or advantage to her appearing; and there were other suspicious circumstances; and the party claiming under the instruments, merely proved the signature of the other party thereto, without offering any evidence of the facts and circumstances under which they were made; of their consideration, object and purpose; of their freedom from undue influence or imposition; or of good faith; *Held* that without assuming the existence of actual fraud, the claimant occupying a confidential relation to the other party, as her agent, at the time the instruments purported to be executed, they were, because of that relation presumptively fraudulent and void, as to her, or her representatives; which presumption could only be overcome by actual proof.

APPEAL from a decree of the surrogate of Saratoga county, on a final accounting by the respondent as executor of Abi Comstock, deceased.

The testatrix became a widow in 1846, and from that time until her death in 1860, resided with the respondent, her son, and who acted as her agent in the collection of rents and other moneys. The testatrix, at the time of her death, was over eighty years old.

In his account the respondent omitted to credit the estate with money received by him, as agent for the testatrix, previous to September 14, 1858; and he charged the estate with a balance for board of said testatrix from 1846 to her death, and with a note for \$1000, dated May 1, 1857, purporting to be signed by her and payable to said executor.

To sustain his claim, and his omission to give credit, the executor produced and proved the signature of the testatrix to the following papers: 1st. A receipt, dated September 4, 1858, for twenty dollars, "in full for rent and all other demands, of whatever name or nature, due from said George." 2d. An agreement, dated December 9, 1857, "to pay said George \$150 per year, for her board, from November 4, 1846, to November 4, 1857, as long as she should live." 3d. A note, dated May 1, 1857, payable three months after date, for \$1000, with interest.

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Evidence was given tending to show that said Abi, during most of the period she lived with her son, did his housework. Other evidence was given tending to show that during the latter part of her life she was quite feeble and incapable of earning her board.

The surrogate held the account sufficient, and allowed to the executor the amount due on said note, and the balance claimed for board. To this ruling the contestants duly excepted.

Wm. Hay and J. R. Putnam, for the respondent.

I. In regard to the claim made against the respondent for rents collected by him of the testatrix, during her lifetime, there was no proof offered by the appellants on this point, except the bare fact that the respondent collected the rents. There is no proof of any claim being asserted against the respondent by the testatrix during her lifetime. No proof that she made any charge. No proof, direct or indirect, that the money so collected by the agent was not paid over to the principal. We produced on the trial a receipt, dated September 14, 1858, proved to have been executed by the testatrix, which acknowledges the payment of rent, in full, up to that time. At the time of the execution thereof, she was of sound mind and competent to contract. Hence we claim: 1. That the decree of the surrogate, holding that this receipt cut off all claim for previous rent, is right, and should be sustained. (a.) This receipt is properly proven to have been executed by the testatrix. We were not bound to prove the circumstances under which it was given. The presumption is that the agent did his duty by paying over the money to his principal, as evidenced by the receipt. There is no evidence in the case contradicting this paper. (b.) If the court were to presume, as might be done, from the latter clause of the receipt, that this money, for which receipt was given, went to pay debts of William P. Comstock, de-

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ceased, and for which debts the building, from which the rents were so received, was liable to be sold, then we submit it was reasonable and right for her to pay those debts and save the property from a sale. It was her interest and duty to make such payment. It was what any good business person would have done under the circumstances. (c.) If, however, it was a gift of the money collected by the testatrix to her son, it was valid, and the finding of the surrogate should be sustained. (*Van Deusen v. Rowley*, 4 Seld. 358.) There is nothing unreasonable or improbable in the supposition that the testatrix should have freely and voluntarily given this money to the respondent. He was her youngest son alive, with whom she had lived for many years. By her will, made in 1857, it appears she did not intend to leave any property to the contestants. The only other person, besides the respondent, mentioned, or provided for, in her will, Daniel Comstock, was dead. George W. Comstock was the only person alive to whom we may suppose she would leave the property. Hence, that she should give it to him, (if it were the fact,) would not be unreasonable or improbable. There is no proof offered to show that this paper was obtained by what is termed "undue influence," on the part of the respondent. No proof that the respondent obtained any advantage by it. It was a mere acknowledgment of a payment. But the claim that may be asserted by the appellants, that it was so obtained, will be considered hereafter. 2. We submit the surrogate erred in refusing to allow the respondent to show the amount of debts of William P. Comstock paid by him. The proof offered, if made with the authority contained in exhibit C, to pay these debts, would have relieved the respondent from any liability for rents, unless the amount received therefrom exceeded the amount of such debts. Paper C, although inartificially drawn, contains an authority from a principal to her agent to pay the debts of William P. Comstock—of course, out of her

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moneys. This authority was proved. It is difficult to see on what principle, proof of the amount of debts paid in pursuance thereof, was excluded. If we had been allowed to make this proof, it would have been an answer to any claim against the respondent for rents. By the allowance, however, of the claim of the respondent against the testatrix, the error of the surrogate became immaterial, inasmuch as the claim overbalances all property left by the deceased.

II. We submit the finding of the surrogate is correct in allowing the respondent's claim for board of the testatrix, pursuant to contract A and B. These papers form but one contract, the note A being indorsed on B. The note A, dated May 1, 1857, seems to have been given on account of board. Afterwards, November 4, 1857, they seem to have made a full settlement for the support of the deceased, from the time she came to live with George, and a contract for her future board until her decease, in paper B. We clearly prove the execution of these papers by proving the handwriting of the deceased. There is no claim that at that time the testatrix was not of sound mind, and capable of making a contract. Hence, this contract is valid and should be sustained, unless the position taken by the appellants—that although the testatrix was of sound mind, yet she was old and feeble in mind and body; that the respondent was her son, with whom she lived, her agent and adviser; that papers A, B and C, were obtained by undue influence; that they show not the will or contract of Abi Comstock, but of George W. Comstock—be correct. The principle which is sought to be made applicable to this case is well stated in *Hill on Trustees*, 156 to 162. "Wherever, from the peculiar relations or connection existing between the parties, considerable authority or influence necessarily exists on the one side, and a corresponding reliance and confidence is placed on the other, a party will not be suffered to abuse this authority or influence by

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extracting from it any advantage to himself. But the court will look into transactions between those relative situations with extreme jealousy, and if it find the slightest trace of undue influence used, or unfair advantage taken, will interfere and give relief. Indeed, in some of these cases, as for instance, in dealings between guardian and ward, trustee and *cestui que trust*, and attorney and client, the transaction is, in itself, considered so suspicious, owing to the near connection between the parties, as to throw the proof on the person who seems to support it, to show that he has taken no advantage of his influence or knowledge, but has put the other party on his guard; bringing everything to his knowledge which he himself knew." (*And see Willard's Eq. Juris.* 170, 176; *Sears v. Shafer*, 1 *Barb.* 408; 2 *Seld.* 268; *Brice v. Brice*, 5 *Barb.* 533, 540; *Stewart v. Lispenard*, 26 *Wend.* 304; *Whelan v. Whelan*, 3 *Cowen*, 537; *Huguenin v. Baseley*, 14 *Vesey*, 273; *Gibson v. Jeyes*, 6 *id.* 266; *Story's Eq. Juris.* §§ 308-324.) In answer, we submit that the appellants fail to show the contract in question obtained by undue influence, within the principle of above authorities. 1. In regard to paper C. There is an entire failure of proof that it was obtained through any undue influence. It was not a conveyance of any property; but simply an acknowledgment of payment of money. We submit that there is no case or authority, holding that a receipt of a few lines, signed by a person of sound mind and capable of contracting, though executed by an old person to her son and agent, (unless some facts be shown casting suspicion on it,) requires any explanation on the part of the person offering it. He is not dealing in a "matter of advantage." He is simply receiving an acknowledgment for money paid, as evidenced by the paper. 2. In regard to contract B and note A. This contract should be upheld by this court. Because the contract, under the circumstances, was fair and judicious, such as a mother might reasonably

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make with her son of her own free will, and without any undue influence; and hence no advantage was taken of the testatrix. (a.) On the trial the appellants, on the ground that the deceased, during some portion of the time she lived with the respondent, did household work, could not understand why it was worth anything to board her; the answer is, the respondent was a single man and kept house for her accommodation, and was entitled to receive pay therefor. The appellants introduced witnesses to show that it was worth nothing to board her, and that her services were of value to the respondent. But they were opposed and overbalanced by the witnesses of the respondent. They fail to show the contract unreasonable or disadvantageous to the testatrix. The reverse is shown; at least the decision of the surrogate on the conflicting evidence to this effect should be final. (b.) The contract was reasonable, because it obliged the respondent to support his mother at a specified rate until her death. Had she been bed-ridden for three years instead of three months, he would have been obliged to support her at the same rate. (c.) In May and November, when the paper was made, Abi Comstock was in the receipt of a fair income from said rents, and able to pay a fair price for her board, and, if in making this contract with her son, she did agree to give him a liberal compensation, we submit it reasonable and right that she should do so. At the time of making it she had been living with her son eleven years. During all that time her income, if it had been paid to her, was only about \$66. But this income, small as it was, appears not to have been paid after the first year, and thus George during all this time had been supporting the testatrix with scarcely any recompense, and with but small chance of receiving any. If, then, when by the accident of her son's death, the testatrix became possessed of an income, she made a contract with the respondent by which she did secure him even a large compensation, is it to be

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wondered at? Is it not what she naturally would and ought to have done; grateful for his past care, support and kindness? Therefore this contract being a fair and reasonable one, made by a person competent to contract, should be sustained. By it the respondent gained no "advantage," and hence it is not within the above authorities. 3. This contract should be sustained because it is the contract of Abi Comstock, made of her own free will. There is absolutely no proof in the case, of the circumstances under which the contract was made. Without going through the evidence, we submit that there is no proof showing, or tending to show, that the respondent exercised any improper influence over the deceased, in obtaining these papers, or that he exercised or had any general influence over her. The evidence offered, to show this fact, such as it was, was in point of time long after the execution of this contract, and failed to show any such influence. What evidence there is in the case shows that there was no such influence. It appears affirmatively that the testatrix was a stubborn woman, and wanted her own way, and was not under the influence of the respondent. Again; the case shows, what appeared more clearly by the personal appearance of the respondent on the trial, that he was not a person likely to acquire an influence over his mother, or any person. The will of the testatrix—executed about a month after this contract—and to draw which she was brought in the presence of two counselors of this court by the respondent, in which one half of her property was willed to Daniel Comstock, shows not only that the respondent had not any general influence over his mother, but did not seek any. If he had, he could have been sole legatee, and this litigation could have been obviated. In this connection it might be asked why, if this contract be valid, should she make a will, when by such contract all the property left by her was swept away. Answer: She was in the receipt of a large income. Had she lived a few

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years more she would have left property to divide. She wished to leave her property to George and Daniel. It would have been unjust to divide equally between the two, and not in the first instance make a liberal compensation to George for his services. The division, as she made it, was fair and judicious. The evidence of the appellants, if true, shows that the respondent did not seek any undue influence over his mother. All the evidence shows that the testatrix was not of yielding or pliant disposition, but stubborn and peevish. How could a son establish an influence over such a person? evidently by humoring; by yielding in small matters; not by harsh language or treatment; not by crossing her; and yet the evidence of the appellants, if true, shows George using harsh language, quarreling with her on small matters, and entirely fails to show any attempt on his part to acquire or hold any general influence over her. Hence, there being nothing unreasonable in the contract; no general influence of the respondent over the deceased, shown; no suspicious fact or circumstance in regard to the execution of the contract being proved; does the fact, merely that the deceased was old, was the mother of the respondent and lived with him, and that he was her agent, authorize the court to set aside the contract? Must the respondent show affirmatively the absence of undue influence? We submit he need not. It is for appellants to show the affirmative, and not for us to show the negative. See *Gardner v. Gardner*, (22 *Wend.* 540,) approving the doctrine of Sir John Nicoll, who fixes the onus on the party charging undue influence, saying: "He must put his finger on the act, showing how it was wrought." Were it necessary for us to show the absence of undue influence, however, we claim we have shown it, by showing a fair contract and the facts above set out. But it was not necessary for us to show the absence of undue influence. There is a distinction between such a case as this and those arising from transactions

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between attorney and client, guardian and ward, and trustee and *cestui que trust*. This distinction is noted in *Hill on Trustees*, (*supra*.) In the later cases, sometimes, the affirmative is on the party claiming under the contract, to show the absence of undue influence. But in a case like this, a party attacking a contract must show a general influence, an unconscientious bargain, fraud or deceit, or some fact or circumstance casting suspicion on the contract, and that the party claiming under the contract has gained an advantage by it. An examination of the leading cases will show this fact. The case of *Whelan v. Whelan*, (3 Cowen, 537,) was an action to set aside a conveyance made by John Whelan, 74 years of age, to his son William, of a farm worth \$9000. There was no consideration, except a bond and mortgage, for the support of the vendor. It was proved that he was credulous and easily led, especially by his son William; that he and his wife had separated, and an action had been commenced against him for her board; that William told him if she went on in this way his whole estate would be dissipated; that if he, John, was going to give him anything, he wished to know it; that as he and his wife were acting, they would soon have little enough for themselves. It appeared that John owed only some trifling debts. The court held (*p.* 577) that William was guilty of actual fraud. In the case of *Sears v. Shafer*, (1 Barb. 408; 2 Seld. 268,) Mrs. Sears executed conveyances of a valuable estate to her brothers, without any consideration, in exclusion of her own children. It was proved that she was of uncommonly mild and amiable disposition, and in case of difficulty very yielding. That at the time she was very ill and depressed in spirits, and was obliged to take laudanum. The paper was prepared by her brother Daniel, with whom she lived on terms of the closest intimacy, and who was her adviser. It was not proved that the paper was read to her, or that she understood it. She could not read or write English. There

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was evidence (2 *Seld.* 273) of her declaration to her brother that she had been compelled to sign the conveyance. In the case of *Brice v. Brice*, (5 *Barb.* 533,) the action was brought to set aside a conveyance of a farm worth from \$6000 to \$8000, for an inadequate consideration, made by the plaintiff to his son James Brice. It was proved that James exercised almost unlimited control over the plaintiff, and acted as his agent; that the plaintiff had become feeble, and depended on his son to do his business. The son, to obtain the conveyance of the farm, told him he had become old and foolish, and alluded to the evidence of his imbecility in having signed papers he ought not to have signed, and thus obtained a conveyance of a valuable farm. The case of *Huguenin v. Baseley*, (14 *Vesey, Jr.*, 273,) was a case of actual fraud on the part of Basely. Thus, in all these cases, as in all others asserting the principle alluded to, a state of general influence on the one part, and of confidence on the other, is expressly shown; an unconscionable bargain, or other circumstance, showing the contract sought to be set aside one that a reasonable person would not make of his own free will. In this case no such proof is made. On the contrary, we show a reasonable and judicious contract, made but a very short time previous to the date of the will, to which no objection is made. We submit that the mere fact of the age of the testatrix, and that respondent was her son and agent, in the absence of other proof, will not invalidate the contract, (see *Van Deusen v. Rowley*, 4 *Seld.* 358;) especially as the contract itself was not in regard to any matter concerning which he was her agent. It may be observed that the writing being prepared or drawn by the party in whose favor it is given, and no instructions being shown to have been given by the party making it, has always been held a circumstance against the validity of such writing. It is not necessary, however, to show instructions, or the reading of the paper. (*Crispell v. Dubois*, 4 *Barb.* 393.) This rule, however, can

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hardly apply to a note or receipt of a few lines, executed by a person in good health, who can read and write; and to understand or draw which paper no legal knowledge was required.

III. It is submitted that the decision of the surrogate, on the questions of fact involved in this case, in favor of the will, as claimed by the respondent above, is final and cannot be disturbed.

IV. The surrogate did not err in rulings, on the trial, against the appellants. The exception taken to the admission of the testimony of the respondent as to the circumstances attending the execution of the agreement, was properly overruled. This evidence was not of a transaction had personally between the witness and the deceased, within the meaning of the Code; but a party had always been competent to make this preliminary proof, prior to the Code, and this rule has not been altered by the Code. (2 *Cowen & Hill's Notes*, 386, note 214, 3d ed.) "Parties and persons interested are always competent to prove the loss of a written instrument, or that it is in the power of the other party, and notice to him to produce it, or other circumstance necessary to authorize the introduction of secondary evidence of its contents, and to prove the death of a subscribing witness, or other fact, in order to the admission of proof his handwriting. Such preliminary evidence is addressed to the court upon collateral points, and is not the subject upon which the jury are to pass." (1 *Cowen & Hill's Notes*, 50, note 35, citing 16 *John*. 193; 20 *id.* 144; 1 *Wend.* 119; 5 *Cowen*, 512; 6 *Wend.* 173.)

A. Pond, for the appellants.

Upon the hearing before the surrogate, the defendant produced the \$1000 note, the contract for board, the receipt in full, and the power of attorney; and proved the handwriting of the signatures thereto to be those of the testatrix, and without other proof, they were received in

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evidence. It was both conceded and proved that the defendant's testatrix was the mother of the defendant; that at the time she signed these papers, if she signed them at all, she was 77 years old, and the defendant was, also, at the time the papers were executed, the agent of the testatrix. There was no evidence given on the part of the plaintiff, or otherwise, to show that the papers above mentioned were read over to the testatrix, or that she knew their contents, or understood their character or legal effect, before or at the time of their execution; nor was there any evidence to show that they were given upon any, and if any, upon what consideration. The plaintiffs claimed and insisted that under the circumstances, and considering the relations existing between the defendant and his mother at the time, and her great age, the defendant was called upon to give other and additional explanatory evidence, besides that of the execution thereof, in order to establish the validity of the papers so offered and received in evidence. But the surrogate decided otherwise, and allowed the defendant the \$1000 note, and gave full effect to the receipt in full dated 14th September, 1858, and held all said papers legal and operative, without any additional or other explanatory evidence besides the mere proof of their execution. And the result is, that in consequence of so holding, the surrogate has disallowed a claim for a large amount of rents collected by the defendant, belonging to his mother, and found the estate indebted in a large sum to the defendant, over and above all the assets belonging thereto, and leaving nothing to the other legatee named in the will, or the plaintiffs, who are his heirs. The main questions in the case, therefore, arise out of the receipt of these papers in evidence, and the effect so given to them by the surrogate. If these papers are presumptively void and of no legal effect without other and additional evidence, it substantially disposes of the entire case, leaving

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only some subordinate questions to be determined, of easy solution. The proof is entirely insufficient to establish either of the papers above mentioned as a valid instrument against the estate, and in favor of the defendant, and they are all presumptively void.

I. The relations that existed between the defendant and the testatrix were such that under the circumstances disclosed by the evidence, without proof outside of the papers themselves, and in addition to evidence of their execution, it is not competent or legal to establish either of them as a valid instrument in favor of the defendant, and against his mother's estate. 1st. As to the \$1000 note, dated May 1st, 1857, which is the first in date of these papers, the evidence is almost conclusive to show it without consideration. (a.) It appears quite clear that prior to, and at the date of this note, the defendant was in fact indebted to his mother in a large amount, for rents collected by him as her agent; and for services in boarding him or keeping his house. The evidence shows that the father of the defendant died in 1846, and that from that time until 1858, when the defendant got married, his mother kept house for him or he boarded with her. Now although the defendant has got some fastidious or interested witnesses to testify that his mother's services were valueless, because she was not, in her extreme old age, a neat and tidy housekeeper, yet all such evidence must be regarded as mistaken, if not false. She did in fact keep his house for him, or he boarded with her, and the defendant cannot now be allowed to say, either that her services, in thus keeping his house, or the board furnished him, was valueless. He was indebted to his mother, therefore, at the time of the date of this \$1000 note, either for his board for the twelve years preceding the date of the note in question, and succeeding the death of his father, which occurred in 1846, or for her services in keeping house for him during that entire period. (b.) But he was also in-

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debted to her at the time in a large amount, for rents previously collected by him as her agent, and which belonged to her. It appears, therefore, that at the time of the date of this note the defendant was actually indebted to his mother over \$500, for cash received by him for rents belonging to her, and interest thereon. Now there is not a particle of evidence, outside of these papers, to show that the defendant ever paid his mother a single shilling. I insist, therefore, that the evidence shows that there was no consideration for this note, and it is consequently void. 2d. The above remarks apply equally to the agreement to pay for board, and the receipt in full. And in addition, it may be said that before the dates of these last papers, respectively, the defendant had received a still larger amount of rents, and also between \$400 and \$500 from Gardiner. I insist that upon this evidence, the agreement to pay for board, and the receipt in full, in the absence of any evidence that the old lady knew the state of the accounts between them, were absolutely void and without consideration. 3d. But if wrong in the above position, still each and every of these papers were presumptively fraudulent and void, and incapable of being made legal and valid in favor of the defendant, against the estate of his mother, upon mere proof of execution alone. At the time of the execution of these papers the defendant was the agent of his mother, and not only on account of the existence of the relation of principal and agent, but also of that of parent and child, between the parties, it was incumbent upon the defendant, before the estate could be made liable upon either one of them, to show that it was fair and equitable in all its parts; that it was read over to, and understood by, this old lady, before it was signed by her. There was no such proof given, and the surrogate therefore erred in allowing and giving effect to these papers. (*Brock v. Barnes' Ex'rs*, 40 Barb.

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521. *Lansing v. Russell*, 13 *id.* 510, 524. *Sears v. Shafer*, 2 *Seld.* 268, 272. *Dent v. Bennett*, 7 *Sim.* 539. 1 *Story's Eq. Juris.* §§ 309, 315.) As already stated, there is no evidence in the case, outside the papers, and proof of their execution, tending in the slightest degree to establish their validity. In order to establish a claim against the estate by means of these papers, the defendant was called upon to show that at the time of their execution the old lady was fully informed of the state of accounts between them, how much the defendant had received from her rents, and that she knew the contents of the instruments to which her signature was obtained. It seems to me the case presents extraordinary features, which call for the application to it of the principle above stated; and in disregarding this principle the surrogate erred, and his decree should be reversed.

II. The surrogate also erred in admitting evidence. He allowed the defendant to testify, in his own behalf, to transactions had personally between himself and his testatrix. This was contrary to the express provisions of the statute. (*Code*, § 399.)

III. The surrogate also erred in overruling the plaintiff's claim that the defendant should be required to render an account as agent of his testatrix, under oath, in the usual manner. The defendant had been the agent of his mother in collecting her rents and other moneys, and it was a case where the law should compel, and does require, him to render an account, under oath, of his receipts and disbursements as such agent. In refusing to require him to render such an account the surrogate erred, and his decree should be reversed. (*Wiggin v. Gans*, 4 *Sandf.* 646.) The decree should be reversed, with costs, and the case remitted to the surrogate, with directions to settle the accounts upon proper principles. (*Wagener v. Reiley*, 4 *How.* 195.)

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By the Court, JAMES, J. It is a well settled rule of equity jurisprudence, that all gifts, contracts, or benefits, from a principal to one occupying a fiduciary or confidential relation to him, are constructively fraudulent and void. The court, in such cases, acts upon the principle "that if confidence is reposed, it must be faithfully acted upon; if influence is acquired, it must be kept free from the taint of selfish interest, and cunning and overreaching bargains." "In this class of cases, there is often found some intermixture of deceit, imposition or overreaching advantage, or other mark of positive or direct fraud. But the principle upon which courts of equity act in regard thereto, stands, independent of any such ingredient, upon a motive of general public policy."

Among the relations subject to the foregoing rule are those of parent and child, attorney and client, and principal and agent. (*Story's Eq. Juris.* §§ 309 to 315.) Story says: "In all cases of this sort, the principal contracts for the aid and benefit of the skill and judgment of the agent, and the habitual confidence reposed in the latter makes all his acts and statements possess a commanding influence with his principal. It is therefore for the common security of all mankind that gifts procured by agents, and purchases made by them, from their principals, should be scrutinized with a close and vigilant suspicion." So of notes, bills, contracts, releases and obligations.

Indeed, agents are not permitted to deal validly with their principals in any case, except upon showing the most entire good faith, a full disclosure of all the facts and circumstances attending the transaction, and an absence of all undue influence or imposition. Transactions which would be held unobjectionable between other parties, are often declared void, if between persons occupying confidential relations.

In the present case the relation of principal and agent existed between the parties to the note, the receipt and

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the contract, strengthened by the further and other relation of parent and child; the parent was old and feeble; she was at least seventy-seven years of age when the first instrument bears date; she lived with her son; the instruments were in his handwriting; they were all for his benefit; no object, benefit or advantage appearing to the other side.

There is a still further suspicious circumstance; the note was dated May 1, 1857, the agreement to pay for board December 9, a will made by the mother giving her property to the respondent and his brother Daniel, December 12, 1857, and followed by the receipt dated September 14, 1858. This last instrument so diminished the assets that the note and claim for board swallowed up the entire estate.

Upon the hearing before the surrogate, the respondent barely proved the signature of the testatrix to the several instruments in question. He offered no evidence of the facts and circumstances under which they were made, of their consideration, their object and purpose, their freedom from undue influence or imposition; or of good faith.

But we do not place our decision in this case upon the ground of actual fraud. We only go so far as to say that the respondent occupied a confidential relation to the testatrix at the time the aforesaid instruments purport to be executed; that because of that relation they were presumptively fraudulent, and void as to her or her representatives, which presumption could only be overcome by actual proof; that as no such proof was made or offered, the presumption continued, and that presumption should have caused the rejection of said items. In this particular the surrogate erred, and his decree should be reversed, and the cause remitted for rehearing; and the costs of this appeal should be paid by the executor in person.

[ST. LAWRENCE GENERAL TERM, October 2, 1866. *Bockes, James, Rosekrans and Potter*, Justices.]

REZIN A. WIGHT, assignee &c., vs. ELIPHALET WOOD.

The defendant received from the plaintiff's assignors certain shares of stock, and executed an instrument acknowledging the receipt thereof, and further saying, therein, "which stock I am to do the best I can with, and have one half of the proceeds."

- Held* 1. That there was not an absolute sale of one half of the stock to the defendant.
2. That the fair and reasonable construction of the agreement was that the defendant was to receive the certificates, and within a reasonable time dispose of said stock upon the most advantageous terms which he could procure, and when that was accomplished, and the proceeds were realized, he was to receive one half thereof, as his compensation.
3. That the sale or other disposition of the stock, by the defendant, was a condition precedent to his acquiring any interest in such stock, or the proceeds thereof; and that the proceeds of the stock did not mean the stock itself.
4. That if the defendant had *sold* the stock, fairly, at whatever price he could obtain, he would have been entitled to retain one half of the proceeds of the sale; but that having retained the stock for more than ten years, without effecting a sale thereof, he was not entitled to retain one half of such stock as his own, but was bound to account to the plaintiff for said stock, together with the dividends he had received thereon. HOGGBOM, J., dissented.

MOTION for a new trial, upon exceptions ordered to be heard in the first instance at general term.

The action was brought by the plaintiff as assignee of Gaylor Sheldon and Alexander G. Sheldon, against the defendant, to recover sixty shares of the stock of the Illinois and Mississippi Telegraph Company, and also the sum of \$630, with interest thereon, being dividends received by the defendant upon said stock.

On the 15th of May, 1854, the said Gaylor and Alexander G. Sheldon were the owners of said stock, which was nominally of the value of \$50 per share. And on that day they delivered to the defendant six certificates representing the said stock, and the latter thereupon executed and delivered to the said Sheldons an instrument in writing of which the following is a copy: "Recd. Albany, May 15, 1854, from Sheldon & Wood, sixty shares tele-

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graph stock, amounting to the nominal amount of three thousand dollars, which stock I am to do the best I can with, and have one half of the proceeds." The defendant retained the said certificates until the 8th day of December, 1864, when the plaintiff demanded them, together with the dividends which the defendant had received thereon, amounting to \$630, and the defendant refused to surrender the same. From the time of the delivery of said certificates up to said 8th day of December, 1864, neither the said Sheldons or the plaintiff in any manner interfered to prevent a sale or transfer of said stock by the defendant. The defendant did not sell or transfer such stock, but retained the same, collecting and retaining dividends from time to time. All that the defendant claims to have done was to carry on some correspondence with certain third parties, in reference to the stock and its value, and expending some money in traveling and negotiating in reference to a contemplated disposal of the stock. The court decided that the plaintiff was entitled to recover one half of the said sixty shares of stock, to wit, thirty shares thereof, and one half the dividends declared thereon, with interest thereon from the time it was received by the defendant, less one half of the dividends received by the plaintiffs, with interest; and directed a judgment that the defendant surrender up one half of said stock to the plaintiff, and pay the one half of the dividends and interest, with the deductions above stated; and that each party should pay his own costs, unless, upon appeal, it should be determined that the plaintiff was entitled to the whole of the stock; in which case, the plaintiff was to have costs. The plaintiff excepted to the part of the decision of the court which determined that the defendant was entitled to one half of the said stock and dividends, and to so much as denied the plaintiff the costs of the action.

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John H. Reynolds, for the plaintiff.

I. The whole question depends upon the construction of the receipt given by the defendant, for the stock in question, on the 15th of May, 1854, by which the defendant acknowledged the receipt of the stock, "which stock I am to do the best I can with, and have one half of the proceeds." The stock was never sold, or in any way disposed of by the defendant, and it is submitted that the defendant never acquired any title to any portion of the stock, and the plaintiff was entitled to recover the whole.

1. At the time of the execution of the receipt, the stock belonged to Gaylor and Alexander G. Sheldon, and the receipt did not purport to, and did not in fact, transfer any title in it, to the defendant. It remained the property of the Messrs. Sheldon until it was transferred to the plaintiff. 2. The only right which the defendant acquired, in any event, was to "*one half of the proceeds;*" and that language implies that the defendant was to sell or exchange the stock for something else, and of that other thing, be it money or property, the defendant would be entitled to one half. The proceeds of any article of property is not the property itself. (*Dow v. The Hope Insurance Co.*, 1 Hall, 166. *Havens v. Gray*, 12 Mon. 71. *Whitney v. The American Ins. Co.*, 3 Cowen, 210.) 3. In order to sustain the ruling at the circuit, it must be held that upon the execution of the receipt or agreement the legal title to one half of the stock vested in the defendant, and thus, without doing anything, incurring any expense, or paying any consideration, he became owner of one half of the property; and being owner, he need do nothing towards converting it into money or other property, and yet be entitled to one half the stock for which he has done nothing and paid no consideration. 4. The true construction of the transaction is, that the defendant was to take the stock, and convert it into money or other property, and for his services in so doing he should be entitled to one half the proceeds or

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property obtained in exchange. 5. At the time the defendant received the stock it was of small value, and has since become valuable, by no act or agency of the defendant. Not having sold the stock or exchanged it for other property, the contingency has not arisen, giving him any interest in it. The effort to sell it or exchange it for other property, is not enough, for the same identical shares are not their *proceeds*, in any sense.

II. The judgment should be reversed, and a new trial ordered.

Samuel Hand, for the defendant.

By the Court, INGALLS, J. We are unable to agree with the learned justice, in the conclusion to which he arrived, in this action. There certainly was not an absolute sale of one half of the stock in question, to the defendant. In my judgment, the fair and reasonable construction of the agreement is this: The defendant was to receive the certificates, and within a reasonable time dispose of said stock upon the most advantageous terms which he could procure, and when that was accomplished, and the proceeds were realized, he was to receive one half thereof, as his compensation. The sale or other disposition of said stock by the defendant was a condition precedent to his acquiring any interest in such stock, or the proceeds thereof. The receipt does not state that the defendant was to have *one half of the stock, but one half of the proceeds*—clearly contemplating a conversion of the stock into money or some other property. The proposition cannot be sustained, upon principle or authority, that the proceeds of the stock means the stock itself. (*Dow v. Whetten*, 8 Wend. 160.) There is nothing in the case showing that custom or usage has given to the word “proceeds,” as applied to stocks, a meaning at variance with the ordinary definition of the word. It cannot be inferred that the Sheldons in-

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tended to make a gift to the defendant of one half of said stock. The very language of the receipt conflicts with such an inference. No; it is clear that the defendant was to *earn an interest*, by contributing his time and skill, and thereby effect a sale of the stock for the mutual benefit of himself and the Sheldons. There was conferred upon the defendant an unlimited discretion in regard to the manner of disposing of the stock, and surely he was allowed more than a reasonable length of time to accomplish the object, as ten years elapsed from the receipt of the certificate and the demand of the stock. If the defendant had sold the stock fairly, at whatever price he could obtain, he would have been entitled to retain one half of the proceeds of such sale. I am at a loss to understand why the defendant should be allowed to retain one half of said stock. It is stated that he corresponded, more or less, with third parties, and expended some money in traveling with a view to the disposition of the stock; but it does not appear how much money he expended, or how much time he devoted to the enterprise. It does appear that he has received, in dividends, \$630. One half of which would, probably, amply compensate the defendant for all that he had expended in the matter. It does not appear that the stock has materially changed, as to value. We are unable to discover upon what principle of law or equity the defendant can reasonably claim to retain any portion of said stock. If it appeared that the Sheldons had prevented or embarrassed the sale of said stock, and had not allowed the defendant ample time to dispose of the same, a very different question would be presented for our consideration. It is suggested that the Sheldons should have exacted a sale before demanding the stock. I cannot agree to this proposition, as it is evident that the stock was placed in the hands of the defendant for that purpose, and he was left in the undisturbed possession thereof, for the period of about ten years, and

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no further action was necessary, or could reasonably be required of the Sheldons to inform the defendant in regard to his duty. We are therefore of opinion that the defendant acquired no title to the said stock, and that the court erred in awarding to him one half thereof; and for this reason a new trial should be granted, with costs to abide the event of the action.

HOGEBROOM, J., (dissenting.) The facts of this case, as assumed or proved, lie within a narrow compass. The defendant received certain shares of stock, of the plaintiff's assignors, *to do the best he could with them, and have one half of the proceeds*. He did the best he could with them, (and so far as appears, that any body could,) and claims one half of their present value, or the proceeds of any sale that may be made or ordered. The stock has not been actually sold; the defendant, in the exercise of a wise discretion, finding it appreciating in the market, concluded it was best to retain it on hand. The plaintiff, finding it actually unsold, claims the whole stock as his, forbids a sale by the defendant, and brings this action to compel a transfer of the whole to him, including one half of the dividends. It is proved or conceded that the defendant has spent time and money and his best exertions in managing the stock, with a view to its ultimate disposition. The dividends of late years have constantly increased in amount, and we may reasonably conclude the stock has a higher market value than ever before. It is not denied but that the defendant had absolute authority to sell the stock one moment before the suit was commenced, and for aught I can see, had such authority afterwards, not being restrained by injunction; though he was forbidden to sell by the plaintiff, and chose, as he lawfully might, to act in conformity to that prohibition. Of that the plaintiff cannot complain, and must accept the position of having disabled him to sell. I think both the

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legal and equitable consequences from this state of things very plain; and these are, that the plaintiff cannot take away that stock from the defendant without accounting to him for one half of its value or proceeds.

There are three questions in the case: 1st. Is the present condition of the case a *casus omissus*, or is it embraced by the contract?

2d. Is the plaintiff's construction of the contract the right one?

3d. If not, has the court below made the proper decree; or is it one of which the plaintiff can complain?

I. I think the case is within the contract. The power given to the defendant over the stock is an authority coupled with an interest. I doubt if it could have been reclaimed by the plaintiff's assignors immediately after its execution. The defendant had rights under it, as well as the plaintiff. But it is not necessary to consider that question. The defendant acted under it for a series of years—performed services—devoted time—expended money in the execution of the trust. He did just what the contract called for; and *all* the contract called for, unless it was a sale of the property, which will be presently considered. I think the contract was intended to embrace every possible contingency. This is independent of the question whether the defendant fully performed the contract, or not.

II. The plaintiff claims that if the defendant did not sell, he lost entirely his claim to one half of the proceeds. This is neither just nor legal. It might well be that the very best thing the defendant could do with the stock (and this he was bound by the contract to do) would be that he should *not* sell. Under such circumstances, a sale would be a *violation*, and not a *performance* of duty. In such case an action would not lie for compelling a transfer of the stock, or for damages for not making a sale. But assume that the time had elapsed in which a sale

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ought to have been had. Then the defendant would doubtless be liable in damages, if he had not done as well as he could. But still the stock would not be the plaintiff's. The defendant would be liable for the difference in value between the present price of one half of the stock and what it would have brought if sold at the proper time; that is, that in the event that *a sale* was absolutely indispensable to be had under the contract, which I doubt. The stock in its present condition, *grown up* to be a valuable stock, yielding large dividends, may, without violence to language, be said to be the *proceeds, product* or *result* of the original comparatively worthless and unmarketable stock in the condition it was when placed in the defendant's hands.

III. But assume a sale to be necessary; the consequence of not selling is not to make the stock the plaintiff's; especially when the plaintiff forbids a sale. The true legal consequence is that a sale should be *ordered*, and the proceeds equally divided between the parties, subject, if the defendant had been guilty of a violation of duty, to a deduction of such damages as the plaintiff had sustained by not making an earlier sale. In the present case no damages are pretended to have been sustained, and the true as well as equitable rule was to order a sale and to divide the proceeds. Perhaps in strictness this should have been the order of the court. But the order actually made was equally favorable to the plaintiff, and he has no cause to complain. He can sell the stock, himself, and thus realize the precise result contemplated by the contract, and take one half of the proceeds.

The disposition of the case made by the court below, as to costs, is not a matter of which the plaintiff can rightfully complain. He demanded more than he was entitled to, to wit, the transfer of the whole stock, and did *not offer* to account for the dividends he had received. He was at

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least equally in fault with the defendant, and cannot object that costs were not imposed on either party.

I think the disposition made of the case at the circuit was right, and should be sustained. Perhaps the case sufficiently raised questions of doubt and importance to justify a division of the costs on the appeal as well as in the original tribunal, and I am therefore content that a new trial should be denied, and that judgment should be rendered for the plaintiff in accordance with the disposition of the case at the circuit, without costs of appeal to either party.

New trial granted.

[ALBANY GENERAL TERM, May 6, 1867. *Peckham, Ingalls and Hogeboom*, Justices.]

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FRANCIS KOWING vs. WASHINGTON MANLEY and FREDERICK
A. MAYHEW.

Where government bonds, deposited with the defendants, by the plaintiff, with express instructions not to deliver them to any person except upon his written order, were subsequently obtained from them, by the plaintiff's wife, fraudulently, by means of a forged order purporting to be signed by him; *Held* that the plaintiff, being legally responsible for the fraud of his wife, he could not recover from the defendants the value of the bonds.

The rule of the common law, on this subject, is not changed, or affected, by the legislation in this State giving to married women the control of their property. While the recent statutes relieve them from many of the disabilities formerly resulting from the marital relation, they do not discharge the husband from the liabilities which that relation imposed on him for the torts of his wife.

THIS case is presented upon exceptions taken at the trial, and ordered to be heard at the general term in the first instance.

The plaintiff Kowing, in September, 1865, left in the defendants' custody certain U. S. securities, which the de-

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defendants had purchased for him. After the bonds had been so deposited, in November, 1865, Kowing sent the defendants directions, in writing, not to deliver his bonds to any person, except upon his written order. In January, 1866, Mrs. Mary P. Kowing, the plaintiff's wife, presented to these defendants a written order for these bonds; purporting to be signed by the plaintiff. The defendants, in entire good faith, believing the signature of Kowing to that order to be genuine, delivered the bonds to Mrs. Kowing, under the order, and took her receipt.

The plaintiff repudiated this order, and alleged it to be a forgery; and brought this suit against the defendants for the value of the bonds.

The case was tried at the circuit, in Kings county, before Judge GILBERT and a jury. At the close of the testimony, the counsel for the defense moved to dismiss the complaint on the whole testimony, on the following grounds:

1. That the delivery of the bonds to the wife of the plaintiff was a delivery to the plaintiff. Her possession was his possession.

2. If the order given was genuine, the delivery was by order of the plaintiff.

3. If the order was a forgery, and as she obtained the bonds on this order, she was guilty of a tort, for which the plaintiff, her husband, is liable. And an action would lie by these defendants against both the plaintiff and his wife, to recover the same sum which the plaintiff asks to recover in this action against the defendants, and therefore this action cannot be maintained.

4. The plaintiff's liability for the tort, in and of itself, is an answer to his ability to have a claim founded on that tort; if otherwise, it would work an absurdity in law.

The motion was denied, and the defendants excepted.

The judge instructed the jury that if the order was not genuine, the defendants were liable, and directed them to answer specially certain questions. The jury found speci-

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ally, 1. That the order presented by the wife was a forgery. 2. That the bonds were delivered under that order. 3. That the wife was cognizant of the forgery, and fraudulently procured the bonds by means of it.

And on these facts the jury found a verdict for the plaintiff for \$10,641.60.

The defendants having excepted to the instructions as to the validity of the order, in case it was forged, the exceptions were ordered to be heard at the general term.

J. O. Dykeman, for the plaintiff.

D. T. Walden and *James Emott*, for the defendants.

I. The bonds, when delivered to the wife, in the view of the law, came to the possession of the plaintiff. Whether the wife had authority to receive the same or not, the delivery to her was in law a delivery to him. The principles of the common law control the matter, and the relation of these parties is to be determined by the rules of the common law, applicable to husband and wife. A wife, at common law, cannot possess personal property; her possession is the possession of the husband. (*Per Walker, Ch. J., in Ball v. Bell, adm'r.* 1 *Alabama Sel. Cas.* 465.) "A delivery to the wife is a delivery to the husband, and the possession of the wife is the possession of the husband." (*Machen v. Machen*, 15 *Ala. Rep.* 373. *McDaniel v. Whileman*, 16 *id.* 343. *Mason v. McNeil*, 23 *id.* 214, 217. *Walker v. Fenner*, 28 *id.* 367. *Clancey on Husb. and Wife*, 1, 2, 3.) And this is so, even if the wife obtains possession by a conversion. If, therefore, in this case the wife obtained possession wrongfully from the defendants, her conversion was, in law, to the use of her husband, because her possession is his possession. (*Bacon's Ab. "Baron & Feme" L.* 2 *Saund.* 47, i. *Saund. Pl. & Ev.* 870. *Bing. on Cov.* 257, and cases cited.) If, therefore, as a matter of

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law, by the possession of the wife the husband was in possession, he cannot maintain this action to recover possession of the defendants, or the value of the property.

II. If the wife obtained these bonds on a forged order, as alleged by the plaintiff, then she was guilty of a *tort* for which the husband is liable, and an action would lie by the defendants against both the plaintiff and his wife, to recover the same sum which the plaintiff in this action seeks to recover against the defendants. (1 *Chitty's Pl.* 92. 1 *Parsons on Cont.* 1 *Stephens, N. P.* 746. *Horton v. Payne*, 27 *How. Pr.* 374. *Solomon v. Waas*, 2 *Hilton, C. P.* 179. *McQueen's Husb. and Wife*, 43 *Law Lib. N. S.* 125, 126, &c. *Reeves' Domestic Rel.* 3d ed. *Parker's Notes*, 148, 149, marg. 72, 73. *Goulding v. Davidson*, 26 *N. Y. Rep.* 604.) The husband could be charged in execution on the judgment, and both by person and by his property, held to satisfy the claims. (*Solomon v. Waas*, 2 *Hilton*, 179.) His liability for the *tort*, in and of itself, is an answer to his ability to have a claim founded on that *tort*. If otherwise, it would work an absurdity in the law. (See also 5 *Car. & P.* 484; 3 *Q. B.* 310; 9 *Exch.* 422.)

III. To prevent circuitry of actions, the law will bar the plaintiff's recovery; for it is a rule, that if the facts upon which the plaintiff relies to recover will charge him, and create a liability on his part, to the same amount, the court will prevent his recovery. (*Broom's Maxims*, marg. p. 309, and cases cited, 5th Am. ed. per Lord Denman, Ch. J. *Walmsley v. Cooper*, 11 *A. & E.* 221. *Lewis*, Ch. J., 15 *Com. Bench*, 62. *Carr v. Stephens*, 9 *Barn. & Cr.* 758. *Simpson v. Swan*, 3 *Campb.* 291, 293. *Turner v. Davies*, 2 *William's Saund. R.* 150, note 2.) In an action for *tort*, for the conversion by the wife, brought by the defendants, the suit would be against both husband and wife. The law of 1862 does not permit her to be sued alone for her *torts*; her position is now as at common law, and the provisions of that act only apply to cases where she can sue alone. (*Horton v. Payne*, 27 *How. Pr.* 374.)

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IV. Although an action for a *tort* of the wife lies against the husband and wife jointly, the *tort* is the *tort* of the husband; he is taken in execution, and his property must answer for the damages. The rule requiring her to be joined, is merely a rule of practice.

V. The verdict should be set aside and a new trial granted; unless judgment is ordered for the defendants.

By the Court, LOTT, P. J. Two material facts are established by the special findings of the jury in this case; first, that the bonds in question were delivered by the defendants to the plaintiff's wife without his written order; and, second, that such delivery was fraudulently obtained by her. The plaintiff had given the defendants express instructions not to deliver the bonds to any person except upon such an order. The first finding, unaffected by the second, would therefore be sufficient to charge the defendants with their value. So, on the other hand, the fraud practiced by the plaintiff's wife upon the defendants has made him responsible for the consequence of that fraud. (*See Reeves' Domestic Relations*, 72; 2 *Kent's Com.* 149, &c.; *Goulding v. Davidson*, 26 *N. Y. Rep.* 604, &c.) This rule of the common law is not changed or affected by the legislation in this State, giving married women the control of their property. While it relieves them from many of the disabilities formerly resulting from the marital relation, it does not discharge the husband from the liabilities which that relation imposed on him for the torts of his wife.

Under such circumstances the plaintiff should not be permitted to recover of the defendants damages resulting from an act of the defendants that was caused by a fraud for which he himself is legally responsible. If he himself had been a participant in the fraud, there certainly could not have been any recovery; and there is no reason or principle why he should stand in a better situation when

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the law makes him responsible for the act, although he had no actual participation in it.

If the plaintiff should be permitted to recover in this suit, the defendants could immediately commence and maintain an action against him and his wife, jointly, in which a recovery would be had, to the amount of his judgment, for damages against them. Such a circuitry of action would be inconsistent with the ends of justice, and with the principles which now prevail in the enforcement of civil remedies.

These views lead us to the conclusion that the general verdict was unauthorized, and as the last special finding of fact is inconsistent with that general verdict, it must, under section 262 of the Code, control the latter, and the defendants are accordingly entitled to judgment thereon, with costs.

[DUTCHESS GENERAL TERM, May 14, 1868. *Lott*, P. J., and *J. F. Barnard*, *Gilbert* and *Tappen*, Justices.]

CONKLIN vs. FURMAN and others.

In an action against stockholders of a corporation, brought by a creditor, to charge them individually with a debt of the corporation, a judgment obtained against the corporation is sufficient evidence of its indebtedness to charge the defendants, unless shown to have been obtained through collusion or fraud. Where, by statute, stockholders are made liable for all the debts of a corporation, to an amount equal to the amount of stock held by them, they are so liable as partners, on the indebtedness, as original debtors, at the moment the contract with the company is completed.

And although the statute contains a prohibition against suing the stockholders, *separately*, until a judgment has been obtained against the company, yet if it gives the right to a creditor to sue one or all of the stockholders *together* with the corporation, and on the recovery of a judgment against the corporation, authorizes a judgment against the stockholders also, there is no period of time, after the debt is incurred by the company, when a cause of action does not exist against the stockholders; and if suit is not brought against them within six years, it will be barred by the statute of limitations.

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A PPEAL by the defendants from a judgment entered upon a trial before the court, without a jury.

The action was brought against the defendants as stockholders of the Newtown and North Hempstead Plank Road Company, to recover a debt owing by said company. The debt was due from the company on the 1st of January, 1855. An action was commenced by the plaintiff, against the corporation and certain of its stockholders, on the 1st of June, 1855, but was dismissed, as to the stockholders, and on the 9th of August, 1860, judgment was recovered against the corporation, for \$5493.97, upon which an execution was issued and returned unsatisfied.

The present action was commenced in June, 1862. The defendants, by their answer, set up the statute of limitations as a defense, and denied the indebtedness. The case was tried in 1864, before the court without a jury. The plaintiff gave in evidence the judgment recovered against the corporation, and the execution issued thereon. Upon this proof the judge found the indebtedness of the company, and that the cause of action accrued within sixteen years prior to the commencement of the action, but overruled the defense, on both points, and gave judgment for the plaintiff.

A. Lott, for the appellants.

A. Hagner and *W. J. Cogswell*, for the respondent.

INGRAHAM, J. Two questions are raised, in this case. 1. Whether proof of the judgment was sufficient evidence of the indebtedness of the company, to charge a stockholder. 2. Whether the statute of limitations barred the action.

I. Upon the trial of the cause the plaintiff introduced in evidence the judgment recovered against the company and the execution issued thereon, and rested. The defendants

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moved for a nonsuit, on the ground that no debt had been proved against the company, and that the plaintiff's claim was barred by the statute. The court denied the motion, and the defendants excepted.

The act under which the liability is sought to be enforced (*Laws of 1847, ch. 210*) provides that the stockholders shall be liable in their individual capacity, for the payment of the debts of such company, &c., to be recovered of the stockholder who is such when the debt is contracted, (§ 14,) and also provides "that no suit shall be brought against such stockholder, until judgment on the demand shall have been obtained against the company, and execution thereon returned unsatisfied." (§ 46.)

In *Bailey v. Bancker*, (3 *Hill*, 188,) Bronson, J., says of this liability of the stockholders: "We have considered this and other charters of a similar character as placing the stockholders on the same footing as though they had not been incorporated, and making them answerable as partners, for the debts of the company." Again: "The suit against the stockholders is not based upon the judgment, but upon the original demand, and the creditor is to recover the same." And in that case the court held the plaintiff was not entitled to recover the costs in the judgment against the corporation.

In *Witherhead v. Allen*, (28 *Barb.* 661,) (a) James, J., says the shareholders are placed precisely on the same ground as though not incorporated, and answerable as partners for all debts contracted by the association. Then the shareholders are the principal debtors, and the statute suspends action against them personally, until redress has been sought against the company. In that case Judge James expresses his opinion that the stockholders are liable for the debt after it is merged in the judgment, and for the costs in the judgment, but adds: "the extent of liability does not arise on this appeal."

(a) Reversed, in the Court of Appeals. (3 *Keyes*, 562.)

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In *Corning v. McCullough*, (1 N. Y. 47,) the whole question is thus concisely stated upon these two sections taken together. The personal liability of the stockholder for the payment of the debt is immediate and absolute, the moment the debt is contracted or incurred by the company; but the recourse of the creditor, by suit, to the stockholder, upon that personal liability, is deferred until he shall have first exhausted his remedy at law against the corporation, or the corporation shall be dissolved. And Bronson, J., in the same case, says: "The stockholders were answerable to the creditors of the company as original and principal debtors, though the creditors were first to exhaust their remedy against the corporation."

In *Belmont v. Coleman*, (21 N. Y. Rep. 96,) this question, whether the judgment was evidence of indebtedness, against the stockholder, was discussed at some length, by Bacon, J.; but the case was disposed of on other grounds, and on this point, the court was equally divided.

It will be seen from this review of the cases, that the question whether the judgment is *prima facie* evidence of indebtedness, against the stockholders, is involved in much difficulty, and by the Court of Appeals is considered a doubtful question. I am not disposed, under these conflicting decisions, to depart from the opinion of the learned judge before whom the case was tried, and would apply to this case the decision in *Slee v. Bloom*, (20 John. 668,) that the judgment debt against the corporation is binding on the stockholders, unless shown to have been obtained through collusion or fraud.

II. The other question, as to the statute of limitations, is the only remaining one, in this case. There can be no difficulty, under the decisions which I have cited, in holding that the liability of the stockholder is created at the same time that the indebtedness of the company takes place. All the cases hold the stockholders to be liable as partners, on the same footing as persons interested in

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private associations are the principal debtors. If there was no suspension of the right to sue, there could be no doubt that the lapse of six years after the claim was payable, would bar the action. Nor can there be any doubt that if the right of action is suspended against the stockholder until a judgment is recovered against the corporation, and execution issued and returned, the statute does not commence to run until the plaintiff has a right to bring an action against the stockholder.

By section 91 of the Code the limitation to bringing the action is six years. By section 74, the action can only be commenced within that time after the cause of action has accrued. And by section 105 it is provided that when the commencement of an action shall be stayed by statutory prohibition, the time of the continuance of the prohibition shall not be a part of the time limited for the commencement of the action.

It is apparent from these provisions that in cases where the creditor is prohibited from suing the stockholder until judgment is recovered against the company, the six years does not commence to run until the recovery of such judgment, because until then the creditor had no right to bring the action. If that were all in this case, on this question, there would be no difficulty in disposing of the case in the plaintiff's favor.

The statute (*Laws of 1847, ch. 210, § 46*) provides that the plaintiff may include as defendants any one or more of the stockholders who shall be claimed to be liable to contribute to the plaintiff's claim, and provides for the recovery of judgment against such stockholders, if judgment is recovered against the company. Here there is a clear right of action given against the stockholder, at the moment the debt is due from the corporation. There is nothing to prohibit such action, for a moment; and in fact such an action was commenced against the company

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and some of the stockholders, but was not prosecuted as to the latter, for some cause that does not appear.

We have then this state of facts. The stockholders are liable for all the debts of the company to an amount equal to the amount of stock held by them, and are so liable as partners, on the indebtedness, as original debtors, at the moment the contract with the company is completed. The statute contains a prohibition against suing the stockholders separately until a judgment is recovered against the corporation, but gives the right to the creditor to sue one or all of the stockholders with the corporation, and on recovering judgment against the corporation, gives a judgment against the stockholder.

There is no period of time, then, when a cause of action does not exist against him, at any time after the debt is incurred by the company. It is true that a particular mode of proceeding, viz., a separate action against the stockholder, is restrained; but this does not affect the general right to sue both the company and all the stockholders, or any of them. It cannot be said that the right of action against the stockholders is either surrendered or prohibited. That right is just as perfect at the time of commencing the action against the stockholders as it is against the company. They may all be sued in the same action, at the same time, and judgment be recovered against all at the same moment. Under these circumstances we cannot say that the commencement of the action is stayed by statutory prohibition, because the plaintiff had a right of action against the defendants immediately, which was not prohibited. The provision that prevented the plaintiff from suing in a particular manner would be immaterial if he had a right of action in another form at once. He suffered that right to remain unexercised, and cannot now say, because he could not sue in another mode which he preferred, that the statute did not run against the claim.

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It is suggested to us that the right to sue the stockholders with the company is merely cumulative. The same remark may be made as to the right to sue them alone. In fact, as partners they should be sued together; and if either remedy is to be considered as cumulative, it is that which allows them to be sued separately.

My conclusion is that the defendants were entitled to succeed in their motion for a nonsuit, upon the ground that the claim was barred by the statute of limitations.

A new trial should be granted; costs to abide the event.

SCRUGHAM, J. The liability of the individual corporators accrued at the time the company became liable. The cause of action against them then arose. An action upon it could not be commenced after the expiration of six years, unless it had been stayed by injunction or statutory prohibition. The statute prohibits the bringing of an action against corporators without joining the company, until judgment has been recovered against the company, and an execution returned unsatisfied. But this prohibition does not extend to actions commenced against them with the company. Such an action may be commenced at any time after the cause of action accrued, and within six years therefrom. The object of the statute is to force the determination of claims within certain periods after their cause accrued; and its effect, when no disability, injunction or prohibition prevents the commencement of an action, is to extinguish the liability, after the expiration of the period limited. If any action affording a complete remedy can be brought within the period, it must be brought within it, or the liability will cease. To decide differently would be to hold that a person is liable upon the same cause of action for six years, in one form of action, and for twelve years in another.

A new trial should be ordered.

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J. F. BARNARD, J., (dissenting.) The statute gives a creditor of certain corporations two actions; one against the corporation and such stockholders as he chooses to join as defendants with the corporation, and another and different action against the stockholders alone, as jointly and severally liable to him for the debt of the corporation.

This is an action against the stockholders alone. It could not, by the statute which gives the right to sue them, be brought until after a judgment had been obtained against the corporation, and execution thereon returned unsatisfied. The debt was contracted over six years before the commencement of this action, which, however, was brought within about six months after the judgment was recovered and execution returned unsatisfied.

The right to bring this action was not perfect until the recovery of that judgment and return of execution therein, and the time in which the plaintiff could not sue should be deducted, and the defense of the statute of limitations is not good.

New trial ordered.

[KINGS GENERAL TERM, September 11, 1865. *Ingraham, Scrugham and J. F. Barnard*, Justices.]

VAUGHAN vs. O'BRIEN.

Where, at the time of executing promissory notes, the maker authorized and directed his agent to affix the proper stamps thereto, and to cancel the same; but such agent, through inadvertence and without any intent to evade the provisions of the revenue law, or to defraud the government of the stamp duty, neglected to affix the stamps, for several months; *Held* that the omission to affix the proper stamps, at the date of the notes, did not avoid the notes.

A judgment rendered by a justice of the peace, on a dilatory plea, viz., upon an issue as to the misjoinder of parties, although it terminates the action, does not affect the right of action on the merits; nor can it be set up as a bar to a subsequent action for the same cause.

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Where a judgment is reversed, on appeal, upon technical grounds not involving the merits, the action constitutes no bar to a second action for the same demands.

A simple judgment of reversal has the same effect, in that action, as a judgment of nonsuit. And where the ground of reversal does not appear, the *onus* of proof is on the party who, in a subsequent suit, relies upon the adjudication as a bar. He must make it appear that the precise point was considered and passed upon in the former suit.

A PPEAL by the defendant from a judgment entered upon the report of a referee.

The plaintiff, by his complaint, claimed to recover, 1st. On a promissory note for \$211.16, dated November 7, 1867, payable one day after date; 2d. On a due-bill for \$20, of the same date with the note; and 3d. \$50 for work, labor and services.

The defendant, by his answer, claimed and insisted that the note was void because not duly stamped, in accordance with the United States internal revenue act. He also averred payment and set-off, and a former suit, in bar.

The referee found that the notes were not invalid for the cause alleged. That there was no stamp to either of the notes, at the time they were executed; but that the defendant then authorized his agent, Mr. Wendell, to affix the required amount of stamps and to cancel the stamps. That the omission to affix and cancel the stamps occurred through inadvertence or mistake, and without any intent to evade the provisions of the revenue laws, or to defraud the government of the stamp duty.

The referee also found that there was a former suit brought by the defendant, O'Brien, in a justice's court, against the plaintiff, Vaughan, and another, wherein said Vaughan set up in his separate answer, as a defense, the claim for work, labor and services referred to in his complaint in this action, and denied that he and his co-defendant were jointly interested in the matters of such suit; and that judgment in that suit was rendered on the issue of misjoinder, only. That there was also another

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action between the parties to this action, before a justice of the peace, wherein the present plaintiff recovered a judgment against the present defendant, for the identical cause of action on which this suit is founded. But that such judgment was reversed by the county court, on appeal taken by the defendant.

The referee awarded judgment in favor of the plaintiff, for \$132.60, with costs.

A. H. Ayres, for the appellant.

J. D. Wendell, for the respondent.

By the Court, BOCKES, J. The appellant's counsel raised two questions on this appeal: 1st. That the notes on which the recovery was allowed were void, because not stamped pursuant to the provisions of the United States internal revenue act; and 2d. That the action was barred by the decision and adjudication on the appeal in the county court.

I. It was made a question of fact before the referee, whether the defendant authorized and directed Mr. Wendell to stamp the papers, as the law required. There was a conflict of evidence on this point, and the referee, who saw the witnesses and heard them testify, found that such authority and direction were given. Nor can it with any propriety be said, after reading the evidence returned on this appeal, that he found incorrectly, or against the evidence, in that regard. It must, therefore, now stand as a well founded fact in the case, that Mr. Wendell was authorized and directed to affix the proper stamps to the paper, and to cancel them. This he ultimately did do, but not until after several months had elapsed. But it is further found, on sufficient evidence, that the omission to affix and cancel the stamps during this period, was through inadvertence, and without any intent to evade the pro-

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visions of the revenue law, or to defraud the government of stamp duty. Under this state of facts, I am unhesitatingly of the opinion that the papers were properly held to be well stamped, and valid against the objections raised. Mr. Wendell testified, in substance, that the defendant, when the notes were drawn, directed him to get stamps and stamp them; that he had no stamps at the office; that he placed the notes in his drawer, because some one came in, at the time, and he neglected to go to the bank and get the stamps; and after that, it was forgotten; and further, that he did not neglect to put on the stamps to defraud the government. Had he gone out immediately and procured the stamps, and affixed them to the papers, and canceled them, as he was authorized and directed to do, these proceedings would have been quite unobjectionable. The delay found, in this case, occurring through inadvertence, should not change the rights of the parties. Having authorized and directed the act, the defendant should not afterwards be allowed to gainsay it. But it has been held, repeatedly, that the omission to affix a proper stamp to an instrument does not avoid it; unless such omission was with intent to evade the provisions of the law. (29 *How.* 29. 47 *Barb.* 187. 50 *id.* 302. 53 *id.* 382.) It was said, in the last case cited, that the invalidity of the instrument is made to depend upon the existence of the intent to evade the act. The case of *Platt v. Broach*, (36 *How. Pr.* 188,) principally relied upon by the appellant's counsel, stands very differently from the present, on the facts. The objection urged, that the notes were invalidated because not properly stamped, is not, in my judgment, well taken.

II. Was this action barred by the former suit? It was not barred, certainly, by the judgment of the justice rendered on the issue of the misjoinder; not even as to the claim for the work, labor and services. That judgment was rendered on an issue raised by a dilatory plea. It

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terminated that action, but did not affect the right of action on the merits. As regards the suit wherein a recovery was had before the justice, by the present plaintiff against the present defendant, and for the same causes of action presented in this suit, the judgment of the justice was reversed by the county court, on appeal taken by the defendant. If reversed on technical grounds, not involving the merits, that prosecution constituted no bar to this second action for the same demands. (4 *Wend.* 95. 8 *id.* 10. 3 *Hill*, 322, 328.) Otherwise, in case the judgment of reversal was rendered on the ground that the plaintiff had no right of action, at all, on the merits. In this case, the ground of reversal does not appear. True, it is stated that *one* ground of error alleged in the notice of appeal was the omission to stamp the larger note. But it does not appear that the reversal of the judgment was based on such omission.

All we have before us is, that the judgment of the justice, for some reason not here disclosed, was held to be erroneous, and was therefore reversed, and thereafter to be held for nought. The judgment of reversal does not purport to be a judgment on the merits, as to the claims in litigation. The decision may have been put on the merits. On the other hand, the reversal may bar when placed on technical grounds merely. Now we are asked to infer that the judgment was pronounced on the merits; that is, to infer that the adjudication proceeded on a particular ground, and basing our conclusion upon such inference, to hold the adjudication conclusive. As I understand the rules, "a particular ground of adjudication can never be inferred and relied upon as conclusive," to bar a right of action. A judgment is no evidence of a matter to be inferred from it by argument. The rule is, that it must clearly and distinctly appear from the record, or from proof *aliunde* the record when such proof is admissible, that the particular ground urged was considered and

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passed upon by the court, in the former suit, or the adjudication will not operate as a bar in a subsequent action. The *onus* of proof, too, in such case, is on the party who relies upon the adjudication as a bar, (10 *Wend.* 60-84; 8 *id.* 91;) and he must make it appear that the precise point was considered and passed upon in the former suit. The case at bar is not brought within these principles.

But the judgment here relied on as a bar is one of simple reversal. Its effect, in that action, was the same as a nonsuit. It does not appear that the adjudication was on the merits. For aught that appears before us, the merits were not considered—certainly it does not appear that they were. It lay with the party urging the point, clearly and distinctly to show that fact, and on that subject either prove the record, or otherwise. We can no more infer that the reversal of the former judgment was on the merits than that it was on technical grounds in no way involving the merits. So it is laid down in *Cowen & Hills Notes*, that the simple reversal of a judgment proves nothing but its own correctness; that it operates no further than to nullify what has been done, and in other respects, the parties are generally left by it in the same situation, as to their rights and remedies touching the matter in controversy, as if no such judgment had ever existed. (35 *How. Pr.* 350, and *cases cited.*)

We are of the opinion that the record in this case discloses no error; hence the judgment should be affirmed, with costs.

Judgment affirmed.

[SCHENECTADY GENERAL TERM, January 4, 1870. *Roskrans, Potter and Bockes*, Justices.]

THE CITY OF BROOKLYN *vs.* THE BROOKLYN CITY RAILROAD
COMPANY.

The condition of a bond executed by a railroad company, to a city corporation. in consideration of the privilege of laying its tracks upon certain specified streets, was that the company should keep the pavement of such streets in thorough repair within the tracks, and three feet on each side thereof, &c.. "under the direction of such competent authority as the common council may designate." In an action for a breach of such bond,

- Held*, 1. That it was immaterial whether or not the clause providing for a designation of competent authority was a condition precedent to the obligors' keeping the streets in repair. That it was a condition that could be waived; and if the acts of both parties were such that a waiver would have been inferred, as a matter of law, prior to the alleged breach, it was not competent for the obligors, in an action for the breach, to set up the clause as a defense.
2. That the defendants had waived the clause requiring a designation, by entering upon, using and repairing the streets from the date of the bond to the day of trial; and that the plaintiff had waived it by permitting the defendants so to enter upon, use and repair the streets without making any designation.
3. That in such action the proper measure of damages was, the amount of a judgment recovered against the plaintiff, by an individual, for personal injuries sustained by him in consequence of the neglect of the obligors to keep a street in repair, and which judgment the city had been compelled to pay.
4. That the city corporation having notified the company to defend the suit brought against the city, and the company having failed to do so, the expenses of defending such suit were also a proper item in the recovery upon the bond.

A PPEAL by the plaintiff from a judgment ordered at the trial, dismissing the complaint.

The defendants, in order to obtain permission from the plaintiff to lay railroad tracks upon certain streets of the city of Brooklyn, and as a part of the consideration for such privilege, executed a bond, to the city, containing this condition: "The pavement [of such streets] to be kept in thorough repair by the said company, within the tracks, and three feet on each side thereof, with the best water stone, under the direction of such competent authority as the common council may designate." Upon the

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execution of this bond, permission was given, by the plaintiff, to the defendants, to lay their tracks upon the streets specified, and they were laid accordingly, and the streets used by the defendants for the purposes of their road. This action was brought to recover damages for an alleged breach of the bond, by the defendants, in neglecting to keep one of the streets in repair, in consequence of which one Ferdinand Meier sustained personal injuries for which he recovered a judgment against the city corporation, which the city was compelled to pay. The amount of such judgment was claimed, in the complaint, as the measure of damages for the breach.

On the trial, the plaintiff was nonsuited, on the ground that there was no evidence that the common council of the city had designated a "competent authority" to superintend the keeping of the pavement in repair; and that such designation was a prerequisite to the performance of the covenant by the defendants.

Wm. C. Dewitt, for the appellant.

G. T. Jenks, for the respondents.

By the Court, PRATT, J. This is an action for an alleged breach of a bond given by the defendants to the plaintiff. The condition of the bond is as follows: "The pavement to be kept in thorough repair by the said company, within the tracks, and three feet on each side thereof, with the best water stone, under the direction of such competent authority as the common council may designate."

The breach was the alleged failure of the company to keep the pavement in repair as provided, whereby one Ferdinand Meier was injured, to the damage of the plaintiff in the amount of a certain judgment recovered by Meier against it, in a suit which the company had been notified to defend.

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The complaint claimed the amount paid by the city, on said judgment, as the measure of damages. The point that no damage was shown was not taken at the trial, and should not be considered here. Had the point been taken when the plaintiff rested, a motion might have been made to put in more evidence; but there was evidence in the case that the defendants had not kept the street in repair as agreed; and the plaintiff, if there had been a breach, was at least entitled to nominal damages.

The point upon which the case was decided, at the trial, was that no breach had been proved, as the plaintiff did not prove, as matter of fact, any designation of competent authority under whose direction the pavement was to be kept in repair. The legal question is, whether this clause is a condition precedent to the obligation of the defendants to make any repairs?

It cannot be denied that the agreement was a sufficient authority for the defendants to enter upon and use the streets for the purposes of their charter, without being liable to the city as trespassers. They did so enter upon and use the streets, and exhibited no fear of liability for their acts, until it became a convenient excuse for their failure to perform the consideration for which their license so to use the streets was granted.

In our view it is immaterial whether or not the clause providing for a designation of competent authority was a condition precedent to the defendants' keeping the streets in repair. It was a condition that could be waived; and if the acts of both parties were such that a waiver should have been inferred as matter of law, prior to the alleged breach, it was not competent for the defendants in this suit to set up the clause as a defense. The bond would become changed by tacit agreement, acted upon by both parties, and neither party could return to and exact the original terms, without reasonable notice of its intention so to do.

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I think it is clear that the defendants waived the clause requiring a designation, by entering upon, using and repairing the streets, from the date of the bond to the day of trial. The plaintiff waived it by permitting the defendants so to enter upon, use and repair the streets without making any designation; and thus both parties acquiesced for several years and until the commencement of this suit. The defendants, by accepting the benefits of the agreement, and going upon the streets and repairing them, gave the plaintiff to understand that they did not require any authority to be designated under whose direction they should do the work; and they are now estopped from setting up, in defense of this suit, laches on the part of the plaintiff, which were induced by their own conduct.

It is a fair construction of the contract between the parties, that the clause, "under whose direction" &c. * * * was a right secured to the plaintiff, which it could avail itself of or not, at its option, irrespective of any claim the defendants might make in that behalf. The city was at liberty to waive the right to designate any competent authority, without any consent on the part of the defendants. It was an additional burden imposed on the defendants. They were not only to keep said streets in repair, but were to do so under the direction of any competent authority designated by the plaintiff. The waiving of this right, on the part of the plaintiff, being in favor of the defendants, they must be presumed to have accepted such waiver, and acceded thereto, for several years, and until the date of the complaint.

The case of *Coombe v. Greene*, (11 Mees. & Welsby, 480,) cited by the defendants, is not analogous to the case at bar. In that case the defendant agreed to expend one hundred pounds upon improvements in a house, under the direction of a surveyor to be appointed by the plaintiff. The defendant could not know where or how to expend the money until the surveyor was appointed. The

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work was not described, and the court held, construing the contract to give effect to the intent of the parties, that the appointment of a surveyor was a condition precedent; but here the work was described; the time when, and the manner how, it was to be done, was stipulated in the contract. The defendants were to keep the streets in repair at all times, within the tracks and three feet on each side thereof, with the best water stone. The defendants not only knew exactly what they were to do, under the contract, but how and when they were to do it.

The substance of the contract, on the part of the defendants, was *to keep* the pavement, at all times, in repair, and not to do work on the pavement when directed by city authorities. This obligation became operative, at all times and under all circumstances, whenever the pavement got out of repair, and the qualification that the work of repairing was to be done under the plaintiff's authority related only to the manner of doing the work, and could not affect the time of doing it, in the absence of a positive restriction not to do it at a particular time.

The contract must be construed so as to carry out the intention of the parties. In order to do this, the court can take into consideration all the surrounding circumstances. A contract will not be so construed as to nullify it, if it can be sustained by any reasonable construction. To judge correctly as to the intention of the parties to this contract, it must be remembered that by it the city conveyed to the defendants a right of great value, and that the only material benefit the city was to receive therefor was the repair of the streets by the defendants. It cannot be presumed that the city intended to grant the right for nothing, nor that the defendants expected to receive it without some equivalent. But as there was a superintendent of streets appointed by law, and as the common council has no power to designate a person as anticipated by the contract, the construction contended

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for by the defendants would relieve them from all liability. This cannot have been the intention of the parties, and the court must seek for some construction that will not do violence to reason. The court must give effect to the contract, as far as possible.

There is no reason why the defendants should not be held responsible for their neglect to make repairs. The measure of damages is that contended for by the plaintiff. The general rule is that the party injured by the breach of a contract can recover all the damage he can prove himself to have sustained. This is qualified, in cases arising on contract, by an exception to the rule, to the effect that the damage must be such as might naturally have been expected to follow the breach. (*Griffin v. Colver*, 16 N. Y. Rep. 489.)

In this case, the natural and ordinary consequences of a breach of the defendants' contract to repair was the injury to Meier and the recovery of damages therefor. Recovery and payment of such judgments as that recovered against the city might naturally have been expected to follow the breach of the defendants' contract. The city should recover the amount paid by them upon the judgment. As they notified the railroad company to defend the suit brought against the city, and the company failed to do so, the expenses of defending the suit are also a proper item in the recovery here. It might be otherwise, were it not that a judgment of the court was necessary to fix the amount of liability, before the city could safely pay.

Nor can it be claimed that these damages are too remote. The defendants' negligence caused the injury, and the injury occasioned the judgment. The question is not what was the *immediate* cause of the loss complained of, but what was the efficient, procuring, predominating cause, upon a comparison of all the facts? The law, though it does not seek for the cause of causes, is sedu-

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lous to find the *true* cause, and distinguish that from its incidents and consequences. A familiar illustration is afforded by cases of insurance against fire. The property may be destroyed by the direct means of water used to extinguish the fire, or injured by removal, or stolen by reason of the exposure caused by the fire. Yet the fire is the efficient cause, and the insurer must bear the loss. In *Siordet v. Hall*, (4 Bing. 607,) the immediate cause of the injury was escape of steam from a boiler; a prior cause was the cracking of the boiler, still again caused by frost. But the court went back of these intervening causes, to the *efficient* cause—the captain's negligence in improperly filling the boiler with water.

In the case at bar, the loss sustained by the city is less remote from the procuring cause than in the cases cited. The city was not bound, as against the defendants, to keep the streets in repair. On the other hand, the defendants owed that duty to the city, and cannot complain of the city for not doing what they had stipulated to do themselves. As against the defendants, the city had a right to presume the street was in repair, and to act accordingly. It is true the city owed a safe road to travelers, but they had contracted this duty out to the defendants, and the defendants were bound to indemnify the city against any loss which was the direct result of their failure to perform their contract. The natural result of their failure was that such injuries would follow, and such damages be recovered. That was the liability which, as between the parties, was assumed by the defendants.

New trial granted.

[KINGS GENERAL TERM, February 14, 1870. J. F. Barnard, Gilbert and Pratt, Justices.]

MILLER vs. WHITE and others.

Since the Code, the power of amendment given by section 178 is always exercised liberally ; and although a complaint may be defective, yet if the court can see that there has been no surprise, and the parties have been fairly apprised of the questions sought to be litigated, substantial justice will be best promoted by trying the cause upon the merits, and giving a judgment upon the testimony, and according to the proofs.

A judgment, free from fraud, recovered against a corporation, is conclusive evidence of the indebtedness of the corporation, in a subsequent action brought against a stockholder, or the trustees of the corporation ; and the defendants in the latter action are bound by it, as fully as the corporation itself.

When the trustees of a corporation are sued, there is no hardship in enforcing the rule. If a judgment against the corporation is unjustly obtained, they are guilty of a grave dereliction of duty if they fail to use the means provided by law to have the judgment reversed or vacated ; and if they allow an unjust judgment to remain in force against the corporation whose interests they have undertaken to guard, they cannot complain when it is enforced against them personally.

Where, in such an action, the complaint alleged the recovery of a judgment against the corporation, and that the same was unpaid, in full force and owing to the plaintiff ; *Held* that this was a sufficient statement of the indebtedness of the corporation to the plaintiff, without any averment as to the time when the original indebtedness was contracted, what it was for, or how much it was.

The complaint in such an action need not state that the defendants were trustees of the corporation when the debt was contracted. For an omission to file the annual report required by the statute, the trustees are liable for all the debts of the corporation then existing.

An allegation, in such a complaint, that the defendants failed to file any such report as is by law required to be filed within twenty days of January 1st in each year, is sufficient.

APPEAL from a judgment entered at a special term, dismissing the complaint, on the ground that it did not contain facts sufficient to constitute a cause of action, and from an order denying a motion for a new trial.

The action was brought by the plaintiff, against the defendants, to charge them, as trustees of the Gutta Percha Manufacturing Company, with a debt owing by the com-

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pany, for which a judgment had been recovered, and an execution issued thereon had been returned unsatisfied.

The complaint alleged that on January 1, 1865, the said Gutta Percha Manufacturing Company were indebted unto the plaintiff. That an action to recover such indebtedness was commenced in the Supreme Court, and a summons duly served upon the president. That the company appeared and answered, and such proceedings were had, that on June 27, 1866, judgment was rendered in the plaintiff's favor, against the company, for \$24,734.62. That execution was issued to the sheriff of the city and county of New York, and returned wholly unsatisfied; and that such judgment was wholly unpaid, and was in full force and owing by said company to the plaintiff, with interest.

The complaint also alleged that neither the corporation, nor the trustees thereof, did within twenty days from January 1, 1865, make, file or publish a report, as required by law, verified by the oath of the president or secretary thereof, and file the same in the office of the clerk of the county where the business of the corporation was carried on; nor within twenty days from January 1, 1866; nor within twenty days from January 1, 1867; nor had they, or any of them, ever, at any time, during the years 1865, 1866, 1867 or 1868, made, published, signed or verified, or caused to be made, published, signed or verified, or filed in the office of such clerk, any such report, as was by law required, since January 17, 1862.

The answers of the defendants denied the indebtedness of the corporation; denied that the amount claimed was due; and alleged that the judgment was obtained by fraud or collusion.

On the trial the defendants moved to dismiss the complaint, claiming that the allegation therein was not a sufficient statement of the indebtedness of the company to the plaintiff; and that the complaint should have stated when

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the original indebtedness was contracted, what it was for, and how much it was. The court held the allegation insufficient, and dismissed the complaint.

By the Court, PRATT, J. The office of a pleading is to apprise the parties to the action of the questions to be litigated, that they may be properly prepared to present their cause, upon the trial. Technical rules are inevitable, in any science; but the extent to which they have been enforced, in some stages of legal history, has been made a reproach to jurisprudence. The tendency of the present day is to relax strict rules whenever substantial justice will be advanced thereby. All the changes in the rules of pleading and practice, for many years past, have been in this direction; and there can be no doubt that the present inclination of courts to try causes upon the merits is an advantage to suitors, and better subserves the purposes for which courts are instituted.

As the law now stands, (*Code*, § 173,) courts have power, in furtherance of justice, to amend any pleading, process, or proceeding, by adding or striking out the name of a party, or by correcting a mistake in any other respect, or by inserting other allegations material to the case, or, when the amendment does not substantially change the claim or defense, to conform the proceedings to the facts proved; and this can be done either before or after judgment.

This power is always exercised liberally, and where the court can see that no surprise is possible, and that the parties have been fairly apprised of the questions sought to be litigated, it is not very easy to put a case where substantial justice will not be best promoted by trying the cause upon the merits, and giving a judgment upon the testimony, and according to the proofs. There is the less objection to this course from the fact that wherever a party finds himself in doubt as to the case made by a

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pleading, he may apply to the court to have it made more definite and certain. By the defendants' not adopting that course in the present instance, we might perhaps infer that they were in no great doubt as to the case to be made by the plaintiff upon the trial; and this would be strengthened by the fact that the defendants were trustees of the corporation.

But we are not left to inference upon that subject. A judgment is a public record, and an examination of the judgment roll would certainly have conveyed all the information that could be desired as to the indebtedness upon which the judgment was recovered.

Our attention was called, upon the argument, to the fact that the testimony upon which the plaintiff relied, to prove his case, had been taken upon commission, and filed in the clerk's office many months before the trial. This testimony fully sets out the facts upon which the indebtedness is claimed to have arisen, and makes it certain that proof of those facts upon the trial could not have been a surprise to the defendants. In fact the particularity with which the defendants, in their answer, describe the facts, shows that their knowledge was abundant, and that they must have come to trial prepared to go into the whole matter.

I am therefore of opinion that the proper course, upon the trial, would have been to hear the testimony in the case; and that the cause should go back for a new trial, and be determined not upon a question of pleading, but upon the proofs. In my opinion that course will be "in furtherance of justice." The discretion of the court being conceded to be a legal discretion, and not an arbitrary power, this renders it proper to review at general term the course pursued at the circuit. If my brethren agree with me, this view will determine the case, so far as the question of a new trial is concerned.

But an important question, as to the weight to be given

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to the judgment, was much discussed before us; and as it may arise upon the next trial, perhaps it is prudent to decide it now. The question arose early in the jurisprudence of this State, and after much discussion it was determined, in *Slee v. Bloom*, (20 John. 669,) that a judgment against a corporation was conclusive evidence of indebtedness of the corporation, in a subsequent action brought against a stockholder, (unless impeached for fraud,) and that the stockholder was bound as fully, by it, as the corporation itself. That decision seems to have settled the law for many years, and the case is laid down as a leading authority on the point, in *Angell & Ames on Corp.* § 515, without any expression of doubt as to the correctness of the doctrine. In *Moss v. Oakley*, (2 Hill, 265,) the late Supreme Court decided the question in the same manner. In *Moss v. McCullough*, (5 Hill, 131,) a different doctrine is advanced, but the decision was reversed in the court of errors, and the case seems to have stopped at 7 Barb. 279, where Justice Willard, delivering the opinion of the court, adheres to the early rule to its full extent. He holds the judgment to be full proof of debt, in an action against a stockholder, unless it is proved to have been fraudulently obtained. In *Peckham v. Smith*, (9 How. Pr. 436,) Justice Bacon discusses the question, and decides that the judgment binds the stockholder. This decision was affirmed at general term. (See 21 N. Y. Rep. 101.) In *Strong v. Wheaton*, (38 Barb. 616,) the Supreme Court came to a contrary conclusion, and held the judgment not to bind the stockholder, arguing that the case of *Slee v. Bloom* had been misconceived, and did not, when properly understood, support the doctrine hitherto supposed. But in *Belmont v. Coleman*, (1 Bosw. 188,) Judge Hoffman, before whom the case of *Slee v. Bloom* was finally closed, wrote a long and exhaustive opinion, reviewing all the cases, and re-asserting the old doctrine of *Slee v. Bloom*, holding that a judgment against a corporation is

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full and complete evidence of indebtedness, in an action against a stockholder. So far as the general term decision can, that case seems to decide the question finally.

In *Squires v. Brown*, (22 How. Pr. 35,) as, in the case at bar, a trustee was sued, and when the case reached the general term, Judge Woodruff, who delivered the opinion of the court, after approving the doctrine so often laid down, that a judgment against a corporation is conclusive upon a stockholder, goes on to say that in the case of trustees, there is greater reason why they should be bound than in case of a stockholder, as they personally transact the business of the corporation. In *Belmont v. Coleman*, (21 N. Y. Rep. 96,) three judges in the Court of Appeals, decide that the judgment is evidence. As the question was not necessary to the decision of the case, the other judges declined to commit themselves to the doctrine, and gave no opinion. In *Conklin v. Furman*, (a) INGRAHAM, J., after reviewing the cases, holds that the judgment against a corporation is conclusive upon stockholders, unless impeached for fraud. A special term opinion by Brady, J., (*Andrews v. Murray*, 9 Abb. Pr. R. 8,) is cited by the plaintiff's counsel, and seems to be authority for the same doctrine.

These are all the cases I have been able to find in this State, in which this question has fairly arisen. In other states the doctrine of *Slee v. Bloom* is followed. (14 Iowa Rep. 235. 39 Me. Rep. 35. 40 id. 527.) And in *Bank of Australia v. Nias*, (4 Eng. L. and Eq. 252,) a stockholder was held to be concluded by a judgment against the corporation.

The rule that a judgment is evidence against a stockholder or trustee, is supported by such a preponderance of authority that it should be left to the court of last resort to change it, if a change is desirable. But on principle, the cases cited seem to be properly decided. Any other

(a) Ante p. 484.

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rule would open the door to endless litigation between stockholders. One stockholder, when sued for a corporate debt, might fail in disproving the existence of the debt. Upon the same evidence, when another stockholder is proceeded against, another jury may come to a different conclusion. When the action for a contribution should be brought to trial, the difficulty would be great. Probably the best interests of the stockholders themselves would be promoted by holding that a judgment against the corporation, free from fraud, is conclusive upon the question. Certainly it is for the interest of the community that a fact once properly established should not again be brought in question. And where trustees are sued, there can be no pretense of hardship in enforcing the rule. For if a judgment is unjustly obtained, they are guilty of grave dereliction of duty if they fail to use the means provided by law to have the judgment reversed or vacated. If they allow an unjust judgment to remain in force against the corporation whose interests they have undertaken to guard, they cannot complain when it is enforced against them personally.

I have carefully examined the reported arguments and opinions, to see upon what ground it can be claimed that a judgment against a corporation has not the binding and conclusive nature of a judgment against an individual, but without success. Surely a judgment is as high evidence of indebtedness as the bonds that form a principal subject of financial transactions. Are bank notes any higher evidence? A judgment is the act of a court, before whom the parties have been brought, that is presumed to be impartial, and that will be prompt to correct any errors into which it may be led.

There seems to be no escape from the conclusion of Chief Justice Spencer, in *Slee v. Bloom*, (20 John. 669,) that a judgment is as conclusive upon the stockholder as upon the corporation.

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The case of *Witherhead v. Allen*, (3 *Keyes*, 562,) was an action against a joint stock company, where all the members are partners, and is not in point. The statute respecting these associations expressly declares that no action shall be brought against the individual partners, until one has been brought against the company *upon the same demand*. Of course the demand upon which an action is brought cannot possibly be the judgment, that does not exist until the suit is ended. Before suing the partners upon the judgment, it would be a condition precedent that a suit upon *that judgment* had been previously prosecuted against the company. That decision goes upon the language of that particular act, and cannot affect the decision here.

Another point is urged, against the complaint, that it does not state that the defendants were trustees when the debt was contracted.

The language of the statute is, that if the companies shall fail to file a report, the trustees shall be jointly and severally liable for all the debts of the company *then existing*. The defendants ask us to exclude from the operation of the statute all such debts as were not contracted by the parties sued. No reason is given for taking this liberty with the statute, except that it is said to be a highly penal one. That affords no reason why the courts should repeal it. So long as it remains on the books, the courts must enforce it, according to a fair interpretation of its provisions. The trustees having the custody of the books, and the control of the corporate affairs, have the means of knowing what debts are in existence, and therefore know the full measure of liability they assume by neglecting their duty.

The opinion of Chief Justice Comstock, in *Boughton v. Otis*, (21 *N. Y. Rep.* 264,) is directly opposed to the construction claimed by the defendants. "A single case may occur where successive boards may be liable for the same

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debts, and that is where there are successive defaults in January. By the very terms of the statute, the trustees omitting to file their statement within the first twenty days of that month, are liable for *all the debts then existing*. Now the debts then existing may be wholly or partly the very debts for which *their predecessors became liable* by reason of a default in the January of the previous year. But from this liability there is a chance of escape, by a simple performance of the duty required."

This opinion was expressly concurred in by a majority of the court, and was not dissented from by any member.

Shaler & Hall Quarry Co. v. Brewster, (10 Abb. Pr. 464) is to the effect that where a trustee fails to file a report in January, he becomes liable for debts contracted before he became a trustee.

Some other objections were made to the complaint, at general term, but as it was conceded that they were not pointed out at the circuit, they need not be considered. Had they been raised then, it is possible they might have been amended, and a party cannot be permitted to lie by until it is too late to obviate an objection, and then raise it for the first time. But the objections do not seem to be important. The failure of the complaint to specify the date in 1865, when John P. White resigned his trusteeship, if otherwise important, is cured by the answer, which fixes the date at February 16, 1865. The allegation that the "defendants failed to file any such report as is by law required to be filed within twenty days of January 1 in each year," is sufficient. Public statutes need not be referred to, in a pleading. The court is supposed to know them.

A new trial should be ordered; costs to abide the event.

[KINGS GENERAL TERM, February 14, 1870. *Gilbert, Tappen and Pratt*, Justices.]

SALINGER *vs.* SIMMONS. •

Where property committed to carriers, consigned to a point beyond their route, was safely transported by them to the termination of their route, and was there delivered to the keeper of a storehouse or warehouse, who acted as the agent of the carriers and others in receiving and delivering freight, by whom it was, in accordance with the usual custom, delivered to a teamster, to be carried by him the remainder of the distance, to the residence of the consignee; and the property was so carried by the teamster and delivered to the consignee; *Held* that the duty of the carriers terminated, certainly upon the delivery of the goods at the consignee's residence, if not before; and that their liability could not be renewed and resuscitated by a return of the property to the warehouse, by the consignee.

Held, also, that the carriers were not responsible for the loss of the goods because the consignee directed the property to be taken back to the warehouse, and because it was so taken back. That to make them liable for the loss of the goods after their return, notice of such return should at least have been given, and that they were required to be taken back to the consignor. To render a common carrier or warehouseman liable for the loss of goods, there must be an acceptance of the goods, and the responsibility does not commence until the delivery is complete. It is not enough that the property is delivered upon the premises, unless the delivery is accompanied by notice to the proper person.

MOTION by the plaintiff for a new trial, upon a case and exceptions ordered to be heard in the first instance at a general term.

The action was brought against the defendants as common carriers and warehousemen, to recover the value of a cask of gin, alleged to have been lost by their negligence. The complaint alleged,

1. That the defendants, as common carriers, on the 22d of September, 1864, contracted to carry a cask of gin, for the plaintiff, from the city of New York to Catskill; and that they so carelessly and negligently conducted themselves, in that regard, that the cask of gin was wholly lost to the plaintiff.

2. That the defendants, as common carriers, agreed to carry a cask of gin from New York to Catskill, consigned to Ira Sherman, East Windham, N. Y.; that the gin arrived

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at its destination, and was stored by the defendants in their storehouse, or warehouse, at Catskill Point, under the charge of J. T. Huntley, their agent, to be delivered to Ira Sherman or his order, and in case of his refusal to receive the same, to notify the plaintiff, and to keep the same stored for him; that Ira Sherman refused to receive the liquor; that the defendants did not notify the plaintiff thereof; that it was stored in their warehouse, and was lost.

Judgment was demanded for \$175. Answers were put in by the defendants, and the cause was tried at the circuit, before Justice PECKHAM and a jury. The facts appearing in evidence, are set forth in the opinion of the court. The plaintiff claimed that upon the evidence the defendants were guilty of negligence, either as common carriers, or as warehousemen. 1. In delivering the property for storage, to Huntley, an irresponsible man, by reason whereof the plaintiff lost the same. 2. In losing the property, and not accounting for its loss, after it was put in the storehouse, on the theory that Huntley was their agent. The court decided that there was no neglect by the defendants, and directed a nonsuit; and the plaintiff excepted.

Jas. B. Olney, for the plaintiff.

C. D. & T. C. Ingersoll, for the defendants.

By the Court, MILLER, J. The evidence in this case establishes that the property in question was safely transported upon the defendants' steamboat to Catskill Point, which was the termination of the defendants' route as common carriers, and was there delivered to one Huntley, who kept a public house and a storehouse and warehouse at that place, and who acted as the agent of the defendants' and of other steamboats, in receiving and delivering freight. The defendants had no interest in the store-

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house or warehouse; and the usual custom was to put all goods there which were landed at the Point, for the consignees, and subject to their call or order. There was no regular line of transportation between Catskill and East Windham, where the goods were to be forwarded; and a teamster, either on his own motion, or otherwise, (it does not appear exactly how,) without any order or direction of the consignee, took the cask and carried it to the residence of the consignee, where it was directed, and delivered it there, in front of his house and place of business, in the presence of two of his sons, (he being absent,) and notified one of them that the cask was for his father. Subsequently, the consignee refused to receive the property, alleging that he had never ordered it; and by his direction and at his request, the teamster brought it back and delivered it at the place from whence it was taken, to some person who was there; but the agent, Huntley, testifies that he did not know it, and it does not appear that he did know that it was there. It disappeared and was lost.

The plaintiff's claim to recover, in this action, is based upon the ground that the defendants were guilty of negligence; and unless this is made to appear, the action is not maintainable.

I think the property was lawfully delivered at its place of destination, at Catskill point, the end of the defendants' route, and properly left at the store or warehouse, which was a suitable place for its deposit, for the benefit of, and on account of, the consignee. Up to this period of time there was no act done by the defendants which indicates negligence, or exposed the property to injury or loss. The deposit at the store or warehouse appears to be in accordance with a well settled rule of law. When the consignee is absent at the place of destination, the carrier may discharge himself from further liability, by placing the goods in store, with some responsible third person, at the place

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of delivery, for and on account of the owner. (*See Northrup v. Syracuse Railroad Co.*, 5 Abb. N. S. 428. *Williams v. Holland*, 22 How. Pr. 137.)

In the case at bar, the goods were left with the agent who was in the habit of receiving them; and had they been lost while there, and before they were removed, the fact that the agent was irresponsible might very properly have been urged as evidence of negligence, and have been entitled to consideration in determining the question of the defendants' liability. But as the goods were safely kept, and forwarded to the consignee by the earliest and most convenient mode of transportation, and as they were not lost at this time, I am inclined to think that no question of negligence arises in the case.

If there had been a regular line of transportation between Catskill Point and East Windham, the delivery of the goods to the next carrier on the route, with proper instructions, would have terminated the defendants' liability. (*Hempstead v. N. Y. Central Railroad Co.*, 28 Barb. 485. *McDonald v. Western Railroad Corp.*, 34 N. Y. Rep. 497.) As there was no such line, nor any other convenient means of transportation, and as the one selected was entirely safe, there was no impropriety or negligence in thus forwarding the property to the consignee. It was one way of notifying him of the arrival of the goods. That it was entirely safe is apparent from the fact that the property was safely delivered to the control of the consignee, so far as was practicable. That it was not accepted, was not the fault of the defendants, but owing to the plaintiff or the consignee. For the misunderstanding between them, which caused a return of the goods and their loss, the defendants are clearly not liable. Nor, in my opinion, are they responsible because the consignee directed the property to be sent back to Catskill, and because it was brought back by his order.

I think that the duty of the defendants terminated,

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certainly after the goods were delivered at the place of business of the consignee, if not before; and their liability cannot be renewed and resuscitated by a return of them to the storehouse or warehouse of Huntley. If the consignee ordered the goods, then he is liable upon the delivery, and he cannot shift the responsibility by directing their return. If he did not purchase them, then the plaintiff was in fault in forwarding them to his direction, and has no good reason to complain of the defendants because the consignee returned them.

There was no authority from the defendants, direct or implied, to return the goods to Catskill Point; and to make the defendants liable, at least notice should have been given that they were returned, and were to be taken back by the defendants, in their steamboat, for the plaintiff. Huntley, the agent, was not aware of their being returned, and no directions were given, as to what they were left for, or what was to be done with the property. Huntley was the agent for three different steamboats, and unless he was advised that the property was intended for the defendants, I do not understand how they can be held liable for his acts. If it be said that he should have notified the owner, the answer is, that the evidence does not show that he had notice of the delivery for the defendants, and hence they are not liable. Huntley being proprietor of the house where the goods were placed and in store, became thereby the agent or bailee of the owner. (*Fisk v. Newton*, 1 *Denio*, 45.)

In establishing the liability of a common carrier, it must not be overlooked that there must be an acceptance of the goods, and that the responsibility does not commence until the delivery is complete. It is not enough that the property is delivered upon the premises, unless the delivery is accompanied by notice to the proper person. (*Grosvener v. N. Y. Central Railroad Co.*, 39 *N. Y. Rep.* 34, and authorities there cited.)

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The defendants were exonerated from liability after the goods were delivered to the consignee, and no steps were taken to bring them within the rule laid down in the case last cited, after they were thus discharged.

In no aspect in which the case can be considered can the defendants be held liable; and the judge, upon the trial, in my opinion, committed no error in his rulings, and properly directed a nonsuit.

A new trial must be denied, with costs.

[ALBANY GENERAL TERM, March 7, 1870. *Hogeboom, Ingalls and Miller*, Justices.]

OWEN vs. THE FARMERS' JOINT STOCK INSURANCE COMPANY.

The omission of a party insured to deliver a particular account of his loss and damage, as required by one of the conditions annexed to the policy, is fatal to his right to recover upon the policy.

Such a provision is a condition precedent, the performance of which, by the insured, is indispensable to his right of recovery, unless it has been dispensed with, or waived, by the insurers.

Time is of the essence of the contract, in conditions of this kind, and there is no power in the court to dispense with the condition, or excuse the non-performance of it.

It is only when a duty is created by the law that a party is excused from performing it, if performance is rendered impossible by act of God, and not when the duty is created by contract.

Conditions of this kind, in a policy of insurance, are designed and inserted for the benefit of the insurer, and may be waived by him; and the courts should construe them most liberally in favor of the assured, and most strictly against the insurer.

A policy contained a condition that, in case of loss, the assured should deliver a particular account thereof to the insurers within ten days. A loss occurred on the 20th of May, 1868. Notice was given, immediately afterwards, to the agent of the insurers at the place where the premises were situated. On the 10th of June, the insurers' general agent and adjuster of losses, with one of the directors and a member of the executive committee, came to the place where the premises were situated, for the purpose of settling the loss. On the 1st of July said agent came a second time, stating that he came to

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adjust the loss. Being told that the assured was absent, and that the proofs of loss had not yet been prepared, he said it would make no difference; that the proofs could be made up and sent when the assured returned. Upon the return of the assured, on the 14th of August, the proofs were mailed to the insurers, who, after keeping them ten days, returned the same to the assured, then informing him, for the first time, that they intended to contest the claim.

Held that these facts constituted a distinct recognition of the liability of the insurers for the loss, after the expiration of the ten days for the service of the preliminary proof. And that this was sufficient to establish a *waiver* of such proof within the ten days.

The general agent of an insurance company has power to bind the company, by making such a waiver.

The fact that insurers, after the time for furnishing the preliminary proofs has expired, put their resolution to contest the claim upon other grounds than the omission to furnish such proofs, is a waiver of that ground of defense.

A policy of insurance was taken at the instance of the insurers' agent, and in exchange for one he had previously issued as the agent of another company. The application was written by such agent, and the name of the assured was put to it by such agent. It was stated therein that there were no incumbrances on the property. It was shown that nothing was said by either party about any incumbrance or lien by judgment, when inquiry was made about incumbrances; or any thing suggesting any necessity or occasion to speak about judgments. *Held* that the inquiry suggested in the application, in respect to incumbrances, was, in fact, and should be in law, limited to mortgages, or incumbrances creating a specific lien on the land. And that the assured was not called upon to say anything about judgments.

Held, also, that in this view of the statement in the application that there was no incumbrance on the property—whether it were viewed as a warranty, or as a representation—there was in fact no intentional concealment or misrepresentation, although there were, at the time, judgments which were liens upon the premises; and that the refusal of the judge to nonsuit upon that ground was not erroneous.

When asked if the premises are incumbered, the applicant, in his answer, need go no further than to mention all specific liens upon the land by mortgage, contract to sell, charges upon the property by will or otherwise, or certificate of sale by the sheriff, if the premises have been sold on execution upon any judgment.

APPEAL by the defendant from a judgment entered upon the verdict of a jury in an action upon a policy of insurance. The material facts, and the legal questions arising thereon, appear sufficiently in the opinion of the court.

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Bradley & Kendall, for the plaintiff.

Rumsie & Robie, for the defendants.

By the Court, E. DARWIN SMITH, J. The first question presented upon this appeal is, whether the omission of the plaintiff to deliver a particular account of his loss and damage within ten days after such loss, according to the 7th section of the conditions annexed to the policy, is fatal to his right to recover. Such a provision is doubtless a condition precedent, the performance of which by the plaintiff is indispensable to his right of recovery, unless it has been dispensed with or waived by the defendant. (*Inman v. Western Insurance Co.*, 12 Wend. 460.) Time, too, is of the essence of the contract in conditions of this kind, and there is no power in the court to dispense with the condition, or excuse the non-performance of it. It is only when a duty is created by the law that a party is excused from performing it if performance is rendered impossible by act of God, and not when the duty is created by contract. (*Hormony v. Bingham*, 2 Kern. 99.)

But conditions of this kind, in a policy of insurance, are designed and inserted for the benefit of the insurer, and may be waived by him, and the courts should construe them most liberally in favor of the assured, and most strictly against the insurer. (*Bumpstead v. Dividend Mutual Insurance Co.*, 2 Kern. 81.)

In this case, I think the condition was waived. The assured was absent from home when the fire occurred. C. C. B. Walker, who is named in the policy as having some interest in it, caused due notice of the fire to be given immediately after such fire, by the defendants' agent at Corning, where the premises were situated. The fire occurred on the 20th of May, 1868. On the 10th of June, afterward, some twenty days after the fire, the defendants' general agent and adjuster of losses, with one of

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the directors and a member of the executive committee, came to Corning to look at the plaintiff's loss, with a view to the settlement of such loss. And on the 1st of July said agent was again at Corning, and stated to Walker that he came to adjust the loss; and being told by him that the plaintiff was absent, and that the proofs of loss had not yet been prepared, said it would make no difference; that the proofs could be made up and sent when the plaintiff returned. Nothing was said by the agent, at this time, intimating a purpose to contest the claim. Walker, the defendants' agent, says: "It was then understood that I was to wait until owner returned." The proofs were accordingly prepared, afterwards, as soon as the plaintiff returned home, were served or mailed at Corning on the 14th of August, and were returned by mail, in an envelope post marked the 26th of August. By the evidence, they were received as soon as the 16th of August, and were there kept ten days before they were returned, when, for the first time, the defendants advised the plaintiff, by Walker, that they intended to contest the claim.

These facts constitute, I think, a distinct recognition of the liability of the defendant for the loss, after the expiration of the ten days for the service of the preliminary proof. This is sufficient to establish a waiver of such proof within the ten days. (*Post v. The Etna Insurance Co.*, 43 Barb. 365. *Bumpstead v. Dividend Mutual Insurance Co.*, *supra.*)

Peake was the general agent, and his acts were binding, and he could make such waiver. (*Sheldon v. Atlantic Insurance Co.*, 26 N. Y. Rep. 460.) The defendants' witnesses, Peake and Conger, establish that they were in Corning on the 10th of July and examined into the facts relating to the fire, and reported to the executive committee that the fire was fraudulent, and the committee then resolved to contest the same, on that ground. This

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was after the expiration of the ten days, and the fact that the defendants then put their resolution to contest the claim upon other grounds than the omission to furnish the preliminary proof, is a waiver of that ground of defense. (*Clark v. New England Insurance Co.*, 6 Cush. 343. *Underhill v. Agawam Insurance Co.*, Id. 445. *Etna Insurance Co. v. Tyler*, 16 Wend. 385, 401. *Bumpstead v. Dividend Insurance Co.*, *supra.*)

The next objection urged in the motion for a nonsuit, that Charles Walker and Austin Lathrop were not made parties, is not well taken. It does not appear that they had, as a firm, any interest in the policy. The answer setting up such interest is not proved. Charles C. Walker claimed to have some interest in the policy, but there is no allegation of such fact in the answer. It is not claimed that he, as an individual, had any such interest. It is asserted that Charles C. B. Walker and Austin Lathrop were partners, and that they, as such partners, were the true owners and holders of such claim upon said policy.

By section 148 of the Code, this objection for defect of parties is waived ; but another answer is that C. B. Walker has put in no separate claim to any interest in said policy, has given no notice to the company of any separate claim or interest in said policy, and if he has any rights and equities, these exist also between himself and the plaintiff. The provision in the policy is, that "loss, if any, shall be payable to Walker & Lathrop, and C. C. B. Walker and the insured, as their interest shall appear." Under this provision the loss was to be paid to the parties named, according to their interest in the premises covered by the policy, as it should appear when a fire occurred. It does not appear that any of these parties, except the plaintiff, has any interest in such premises. C. C. B. Walker, it is true, claims some interest in the policy, under some judgment against Owen ; but no such judgments were proved, and no interest in said policy appears to exist in him. If

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he sought to make any claim under the policy against the defendant, he was bound to give specific notice of such claim, and state its value and extent, that it might appear to said company as it existed at the time when said fire occurred. The motion for nonsuit was therefore properly denied, so far as these grounds are concerned.

The defendants also claim that the court erred in refusing to nonsuit the plaintiff at the close of the evidence, for the reason that the statement, in the application made by the plaintiff for the purpose of procuring the insurance, that there was no incumbrance on the property insured, was a warranty on the part of the plaintiff that there was no incumbrance on the said premises, whereas the said property was in fact, at the time of such application, incumbered by three judgments. The policy contains a provision that it is made and accepted in reference to the terms and conditions annexed, which are therein declared to be part of the contract, and are to be used and resorted to in order to determine the rights and obligations of the parties, in all cases not therein otherwise provided for. Among the conditions annexed to the policy is one, the second, declaring that all applications for insurance shall be in writing, according to the printed forms prepared by the company, and must specify, among other things, whether the property is incumbered, and if so by what, and to what amount. In the first section it is provided that the applicant is responsible for the truth of the statement in relation to certain matters in the description and use of the property, and in relation to the ownership of the property, incumbrance on the same, and other insurance, on the property; and that the applicant is thus bound, whether he signs the application or not. And the third section of said conditions provides "that if any person effecting insurance in the company, shall make any misrepresentations or concealment touching the risks to be assumed, then the insurance shall be void."

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The application in this case contained the following statement: "The incumbrance on this property is 0000." The learned judge at the circuit held that this was a representation and not a warranty, and submitted the question to the jury whether such representation was false and fraudulent. This, I think, was error, so far as related to the question of fraud. In any view of the statement, the applicant was responsible for its truth, and if it was false in fact, the policy, I think, was void by the express terms of the contract. (*Angell on Ins.* 180. *Burritt v. Saratoga Ins. Co.*, 5 *Hill*, 188.) But the question remains for consideration, what was the statement in fact intended to be, and what was its fair construction? It was taken and confessedly written by the defendants' agent, and the plaintiff's name was put to it by such agent. It is a palpable imposition upon the plaintiff if the policy is to be avoided by the acts of the defendants' agent, under the circumstances as detailed in the evidence by him and the plaintiff. This policy was taken at the instance of such agent, and not at the request of the plaintiff. The policy was taken in exchange for one held by the plaintiff, taken by such agent, in the Lorillard Insurance Company.

The representations as to incumbrance, as detailed by both parties, related to a mortgage on the premises existing when the previous policy was taken, which was spoken of between them, and which the plaintiff said he was about paying off. It does not appear that anything was said by either of the parties about any incumbrance or lien by judgment on the property, when inquiry was made about incumbrances, or anything suggesting any necessity or occasion to speak about judgments. I think, therefore, that the inquiry suggested in the application in respect to incumbrances on the premises was in fact, and should be in law, limited to mortgages or incumbrances creating a specific lien on the land. I do not think the inquiry necessarily called upon the plaintiff to say anything about

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the judgments. If the defendants desired to know whether the premises were subject to the liens of any judgments against the insured, they should have asked that question, and distinctly called the attention of the plaintiff to the subject, in the application. When asked if the premises were incumbered, I think the answer need go no farther than to specify all specific liens upon the land by mortgage, contract to sell, charges upon the property by will or otherwise, or certificate of sale by sheriff, if the premises had been sold on execution upon any judgment. Before such sale, a judgment was nothing more than a general lien upon all the real estate of the judgment debtor. Such judgment could not affect the real estate till the personal property of the debtor was exhausted, and the defendants may have personal property sufficient to satisfy these judgments. And the plaintiff testified, also, that he had eleven other village lots in the village of Corn-
ing, where he resides, which he still owns, upon which said judgments were also a lien.

The insurance company in such case, I think, might very reasonably desire to know what specific liens or incumbrances then existed upon the property, because such liens or incumbrances would be also insurable, and the company might, in this view, very properly desire to know what other insurance might be taken or put upon the insured property by other parties, thereby increasing the risk and liability by fraudulent fires. But judgment creditors having no specific lien upon any particular portion of the debtor's property, would be little disposed, ordinarily, to insure any of such property if they had in fact any insurable interest therein. In this view of the statement that there was no incumbrance on the property, whether viewed as a warranty or as a representation, there was, in fact, no intentional concealment or misrepresentation, and the refusal of the judge to nonsuit was not erroneous, and the verdict of the jury for the plaintiff was right.

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No error, injurious to the defendants, at least, was committed by circuit judge or the jury. The finding of the jury that there was no fraudulent representation was clearly right, if no substantial misrepresentation was in fact made. Clearly none was intended. Upon the whole case I think the recovery right, and that the judgment should be affirmed.

Judgment affirmed.

MONROE GENERAL TERM, September 6, 1869. *E. D. Smith, Dwight and Johnson*, Justices.]

THE CONGRESS AND EMPIRE SPRING COMPANY *vs.* THE HIGH
ROCK CONGRESS SPRING COMPANY.

The principle which underlies the doctrine of trade-marks is, that he who, by his skill, industry or enterprise, has produced or brought into market or service some commodity or article of use, convenience, utility or accommodation, and affixed to it a name, mark, device or symbol which serves to designate it as his, is entitled to be protected in that designation from encroachment, so that he may have the benefit of his skill, industry or enterprise, and the public be protected from the fraud of imitators.

The doctrine of trade-marks can have no application to a name given to a natural element in its natural state.

All the cases reported are cases where the marks infringed were used and applied to artificial compounds, products or manufactures originated by the science, skill, diligence or enterprise of man; and in all these cases the principle of the law is stated and restated as applicable to protect the skill, industry and enterprise of mechanics, manufacturers and inventors; and hence only applicable to artificial products. *Per JAMES, J.*

Where the plaintiff, as owner of a mineral spring, called the "Congress Spring," and widely known as such, and its water by the designation of "Congress Spring water," for over seventy years, was entitled to the rights of its predecessors in the use of the word "Congress," and that word had previously only been used and applied to water in connection with said spring and its water; it was yet *Held* that as the water was not an artificial product, and there was nothing in the mode of bottling the water for sale, or the mode of sale, originating with the plaintiff, or the former owners, which the word "Congress" defined, designated or implied, the plaintiff had no exclusive right

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to the use of that word in connection with such business, or in connection with the word "water," or the words "spring water."

Accordingly *held* that the plaintiff was not entitled to an injunction against a corporation called the "High Rock Congress Spring Company," the owner of another mineral spring, named the "High Congress Spring," to restrain such corporation from using the name "High Rock Congress Spring Company," or any name containing "Congress Spring Company," in its business of putting up mineral waters; and from using or putting upon any bottles, corks, boxes or packages, &c., the words "Congress water," or "Congress Spring water," either alone or in connection with other words, &c.

A name can only be protected as a trade-mark when it is used merely as indicating the true origin or ownership of the article offered for sale. Never when it is used to distinguish the article itself, and has become, by adoption and use, its proper appellation.

Held that within the above principle neither the plaintiff, or its predecessors, acquired, or could acquire, any property in, or exclusive right to the use of, the word "Congress," in connection with the word "water," or the words "spring water;" because that word had no relation to, and did not indicate the origin or ownership of the article named, but only designated the article itself, which designation had become, by adoption and use, its proper appellation.

APPEAL by the plaintiff from an order of the special term dissolving an *ex parte* injunction restraining the defendant from using the trade-mark of the plaintiff, and from selling as "Congress water," other water than the natural water of the Congress Spring at Saratoga Springs.

The motion was based upon complaint, answer and affidavits. The complaint averred the plaintiff to be the owner of a spring discovered in 1792, and then named Congress Spring; that its waters were widely known as "Congress water," and as possessing peculiar medicinal virtues; that there were many other mineral springs at the same place, but none possessing the same peculiar properties, and none had ever been called by the name of "Congress Spring," or their waters "Congress water." That from 1825 the proprietors of said spring had been engaged in bottling its water and selling it as "Congress water," which business has become very extensive, and "Congress water" has become a well known article of

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commerce; and that during all the period since 1825 the proprietors of said spring, until the acts of the defendants, herein complained of, had enjoyed the exclusive use of the name of "Congress water." The manner in which successive proprietors of said spring had put up its waters, the bottling, corking, marking, and labeling is then set forth, and it is averred that it had been customary for each proprietor to re-purchase bottles emptied, and in that way use bottles with the proprietary marks of his predecessors. It was then alleged that the defendant had recently commenced selling medicinal water, intended to resemble "Congress water," under the name of "*High Rock Congress Water*;" that it used bottles of the same general form, with marks upon the cases and boxes resembling those used by the plaintiff, and that it did this to deceive the public, and to induce the belief that the water it sold was the water of "Congress Spring," and to sell it as "Congress water."

Judgment was demanded that the defendant &c. be restrained from using the name "High Rock Congress Spring Company," or any name containing "Congress Spring Company," in the business of putting up mineral waters, and from using or putting upon any bottles, corks, boxes, or packages, &c., the words "Congress water," or "Congress Spring water," either alone or in connection with other words, &c.

Upon the complaint, and upon affidavits annexed, showing that the defendant was putting up water in bottles in the general form used by the plaintiff, marked "High Rock Congress Spring Water Company, C. & W., Saratoga, N. Y.," and kept a place in New York for the sale thereof, with a sign, "High Rock Congress Spring Company," a temporary injunction was granted restraining the defendant, &c., as prayed for in the complaint.

The answer of the defendant denied all the allegations of the complaint, except as thereafter admitted; and

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particularly denied all fraud or intent to defraud, &c. It conceded that John Clarke owned the Congress Spring from 1825 to 1846, when he died; it then averred that the business of bottling and selling the water of Congress Spring was carried on by Eliza Clarke, the widow, under the name of "Heirs of John Clarke," until September, 1846, when W. B. White and D. Shepherd became jointly interested and carried it on under the style of "Clarke & Co.," using the trade-marks, words and other symbols used by John Clarke, under the authority of Mrs. Eliza Clarke, his widow, to whom such right had been conveyed, and paying her therefor one thousand dollars per year until July 1865; that in July 1865 said "Congress Spring" was, by the executors of John Clarke, conveyed to Eliza Sheehan, and by her subsequently conveyed to the plaintiff, and that said executors did not assume to convey any right, and the conveyances conferred no right upon the plaintiff, in or to the use of any trade-mark, words, symbol or other designations which had theretofore been used by the former proprietors of said Spring, or either of them. That the High Rock Spring, now owned by the defendant, was owned by John Clarke in his lifetime, and that afterwards its title was in parties controlling Congress Spring, until the conveyance by them to Mrs. Sheehan; that during all that period the proprietors of said Spring had bottled and sold the waters of said High Rock Spring in similar bottles, with marks similar to Congress Spring water, except that it was called "High Rock Spring water;" that said waters are very similar in their qualities; that the word "Congress," as applied to mineral water, is used to denote the quality of the water, and not its *origin or ownership*, and is an arbitrary name; that the word "Congress" has been applied to "Putnam's New Congress Spring," and that the name used by the defendant, "High Rock Congress Spring," is not calculated to deceive the public, or any one who deals in the waters of either spring.

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That the bottles used by the defendant have a raised representation of the rock at their spring. That Mrs. Clarke, in whom remained the right to use said trade-marks, &c., transferred the right to use them to the defendant, and the defendant has the right to use the same. This answer was duly verified.

The affidavits established that the plaintiff's spring was discovered in 1792; that it was named "Congress Spring" because discovered by a then member of Congress; that it had ever since that time retained that appellation; that with the exception of a spring known as "Putnam's Spring," having been called "Putnam's New Congress Spring" for a short time, the plaintiff's was the only spring known as "Congress Spring;" that its waters had become quite an article of commerce, and had obtained a wide reputation for medicinal virtues; that it was put up in pint and quart bottles, each having impressed upon it, in raised letters, "Congress and Empire Spring Co., Saratoga, New York;" that the bottles were put up in boxes and marked with the same words, except that the letter "C" was inside of the outlines of a bottle. That High Rock Spring was discovered many years before Congress Spring, and was always known by the name of High Rock Spring; that said spring is now owned by the defendant; that its waters are now bottled in pint and quart bottles in shape similar to those used by the proprietors of Congress Spring; and have impressed and raised upon them, "*High Rock Congress Spring Water, a conical rock, C. & W., Saratoga, N. Y.*" That this water is put upon the market; that a wholesale warehouse for the sale of the same is kept in New York; that the bottles are put up in boxes and marked in its name, but in similar form to the plaintiff's boxes, and that the word "Congress" is used in the defendant's name and on its bottles, as likely to bring more custom and insure more sales than could be obtained without it.

The allegations in the defendant's answer are, that the

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plaintiff had no right to the trade-marks, words, symbols, or other designations which had been used by the former proprietors of Congress Spring; but that the same were the property of Mrs. Eliza Clarke, is not denied.

A motion having been made, by the defendant, to dissolve the temporary injunction, the following opinion was delivered at the special term:

ROSEKRANS, J. It is well settled that a court of equity will not exercise its power to restrain the use of a trade mark, the exclusive right to which is claimed by the plaintiff, unless a good legal title thereto is alleged in the complaint, and the court can see from the plaintiff's own statements that the right which he seeks to have protected clearly belongs to him, and has been infringed. (25 *Am. Jurist*, 279.) Nor will the court interfere by injunction when such title is alleged, if the right is denied by the defendant, or is rendered doubtful. (2 *Sandf.* 599.) *Wolfe v. Goulard*, (18 *How. Pr.* 64,) opinion of INGRAHAM, J., citing 2 *Barb.*, and *Motley v. Dennison*, (3 *Mylne & Craig*, 14,) is within these principles. I think that the injunction order in this case should be vacated, so far as it restrains the use by the defendant of any trade-mark used by the former proprietors of Congress Spring upon the bottles or corks used in bottling the waters of that spring, or the boxes in which they packed their bottles.

The plaintiff does not aver that it purchased the right to use such trade-marks, or that the right was assigned to it, and such right is only deducible from the allegation that the plaintiff purchased the Congress Spring. The conclusion by no means follows that the right to the trade-mark passed with the title to the real estate. Indeed, it is questionable whether the plaintiff could be protected in the use of the trade-mark of a former proprietor of the spring under an express assignment of the right, unless

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he indicated that he used them as assignee of the former proprietor.

The use of such trade-mark without such indication, would be an imposition upon the public—"a sailing under false colors," to use the language of Wilson, Ch. J., in *Sherwood v. Andrews*, (*Am. Law Reg. Aug. 1866, p. 597.*) In *Partridge v. Menck*, (*cited 13 How. R. 397; How. App. Cases, 547.*) Gardner, J., delivering the opinion of the Court of Appeals, says: "An assignee of a trade-mark has no special privilege of deceiving the public, even for his own benefit." It is, however, unnecessary to consider the question how an assigned trade-mark should be used. It is sufficient for the purpose of determining whether the injunction order should be retained, so far as it restrained the defendant in the use of the trade-mark of the former proprietors of Congress Spring, that the plaintiff has not alleged or set out such rights in himself, except inferentially; and the inference he seeks to have adduced from his allegations does not legally follow. In addition to this, the defendant's answer expressly alleges that such rights were not assigned to the plaintiff, and that the parties who conveyed Congress Spring to the plaintiff neither conveyed or assumed to convey to the plaintiff any right, title, or interest in or to the use of any trade-marks, words, symbols, or other designation which had theretofore been used by the former proprietors of said spring; and the plaintiff, in the affidavits read in opposition to the motion to dissolve the injunction, fails to furnish any evidence to contradict these allegations of the answer. These remarks are intended to apply to all the trade-marks used by the former proprietors of Congress Spring, both their form and substance, except the words "Congress Spring," and "Congress water." As owner of the spring, the plaintiff has the right to use those words as descriptive of property in any manner it may choose, and the question whether such right is exclusive is the principal one to be consid-

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ered. The word "Congress," as applied to this spring, was an arbitrary name, given to it at the time of its discovery in 1792, for the reason that the person who discovered it was at the time a member of Congress; and the water of this spring is called Congress water because the spring is called Congress Spring. These names are merely descriptive of the spring and its waters. They have been used for that purpose for three-fourths of a century, and by such use have become the proper appellation of the spring and its water. They have no reference to the title or ownership of either the spring or its water, but are used merely to designate them. It may be, and doubtless is the fact, that to most persons who use the water, the name thus adopted is suggestive of its properties and qualities; that it is a mineral water having certain medicinal qualities, and producing certain effects upon the human system. But to none can it convey any idea as to who is the owner of the spring, or who is engaged in bottling and vending its waters. The law in relation to the use of names or words as trade-marks, and the extent to which an exclusive right can be maintained to such use, under the protection of a court of equity, has been fully considered by the courts of this State, and is well established.

In *Wolfe v. Goulard*, (18 How. Pr. 64,) most of the cases are considered by Ingraham, J., and their substance is expressed by him as follows: "Where a person forms a new word, used to designate an article made by him, which has never been used before, he may obtain such a right to that name as to establish him in the sole use of it as against others who attempt to use it for the sale of a similar article; but such an exclusive use can never be successfully claimed of words in common use, previously, as applicable to similar articles. * * * Words, as used in any language, cannot be appropriated by any one to his exclusive use to designate an article sold by him similar to that for which they were previously used."

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In *Burgess v. Burgess*, (17 *Eng. Law and Eq. R.* 257,) it was held that a person had a right to make and sell an article called "Essence of Anchovy," although the plaintiff and his father had, for a long term of years, been making and selling such an article, under that name, originally invented by them, and that, too, when the same was sold in bottles of the same shape as the plaintiff used, with labels, wrappers and catalogues bearing a general resemblance to those used by him.

In *The Amoskeag Manufacturing Co. v. Spear & Ripley*, (2 *Sandf.* 599,) Duer, J., says: "It is certain that the use by another manufacturer, of the words and signs indicative only of these circumstances," in indicating the origin of the article, its appropriate name, the mode or process of its manufacture, "may yet have the effect of misleading the public as to the true origin of the goods; but it would be unreasonable to suppose that he is, therefore, precluded from using them as an expression of the facts which they really signify, and which may be just as true in relation to his goods as those of another."

In *Stokes v. Landgraff*, (17 *Barb.* 608,) the point was fully discussed by Strong, J. After showing the cases in which one may by priority of appropriation obtain a right to the use of names, letters, marks or symbols of any kind, he adds: "In respect to words, marks, or devices which do not denote the goods or property, or particular place of business of a person, but only the nature, kind or quality of the articles in which he deals, a different rule prevails. No property in such words, marks or devices can be acquired."

Mr. Justice Duer, in *Fetridge v. Wells*, (13 *How. Pr.* 355,) says, a name may rightfully be used as a trade-mark, but this is only true when the name is used merely as indicating the true origin and ownership of the article offered for sale—never when it is used to designate the article itself, and has become, by adoption and use, its

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proper appellation. The name, no matter when or by whom imposed, becomes, by use, its proper appellation. Hence, all who have an equal right to manufacture and sell the article, have an equal right to designate and sell it by its appropriate name, *provided each person is careful to sell the article as prepared and manufactured by himself, and not by another*. The exclusive right to use as a trade-mark the appropriate name of a manufactured article exists only in those who have an exclusive right to the article itself. So it was held by Lord Mansfield, in *Singleton v. Bolton*, (3 *Doug.* 293,) that although the plaintiff had been selling a particular medicine under the name of Dr. Johnson's Yellow Ointment, yet the defendant had an equal right to prepare and sell it under the same name, there being no evidence to show that he sold it as prepared by the plaintiff. In *Perry v. Moffit*, (6 *Beavan*, 66,) the plaintiff claimed to be the inventor of "Perry's Medicated Mexican Balm," and applied for an injunction to restrain the defendant from selling a similar medicine, which he called Moffit's Medicated Mexican Balm, but the injunction was not granted.

In *Clark v. Clark*, (25 *Barb.* 76,) Justice Mitchell held, in the general term of the first district, that a manufacturer might use the same word as another to designate his manufacture, but must not use it to imitate an article previously sold by another.

In *Brooklyn White Lead Company v. Masury*, (25 *Barb.* 416,) the court held that although the plaintiff had sold their lead under the name of Brooklyn White Lead for a long time, yet that the defendant might assume the same name to describe a similar article sold by him, and only restrained him from adding the word "Co." thereunto as used by the plaintiff. And in the *Merrimack Manufacturing Co. v. Garner*, (4 *E. D. Smith*, 387,) it was said that the defendant had a right to imitate and sell the same style of goods as those manufactured by the plaintiffs, and

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that the plaintiffs had no ground of complaint, unless the label used upon the articles in imitation, could lead persons to suppose they were buying goods actually manufactured by the plaintiffs. "From these cases, and various others which might be cited," says INGRAHAM, J., "it is apparent that no persons can acquire a right to the exclusive use of words applied as the name of an article sold by them, if, in the ordinary acceptance, they designated the same or a similar article. Applying these principles to the case under consideration, it is clear that the injunction order must be vacated. The plaintiffs and their predecessors have applied to a natural object, a mineral spring owned by them, an arbitrary name by which it has been known for upwards of seventy years. Such name has become its proper appellation. The water of the spring, for the same length of time, has been known as Congress water. Such use has made the name its proper appellation. The plaintiff and its predecessors have no exclusive right to all mineral waters having the same or similar properties, and therefore have no exclusive right to the name which they have thus applied. The defendants, as they allege in their answer, and as is not denied, are the owners of another spring, the water of which is very similar in its peculiar mineral qualities to that of Congress Spring, the water of the defendant's spring being in every respect equal, if not superior to the water of Congress Spring. The analysis of the water of these two springs presented to me on the argument, and contained in Steel's and Allen's analysis of the water of various springs at Saratoga, shows that the same elements enter into the composition of the waters of the plaintiff's and defendant's springs, although not in precisely the same proportions in both.

The defendants have applied to the water of their spring a name which for years has designated such similar water of the plaintiff, and in order to protect the public against

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deception, and to prevent purchasers being induced to believe that the water sold by the defendant is obtained from Congress Spring, they have prefixed to such name and united with it that of another spring, discovered earlier than Congress Spring, and known for a longer time as *High Rock Spring*, and designating the water which they sell as High Rock Congress Spring Water. The representation made by this name I regard as true, and in no way calculated to deceive the public or to injure the plaintiff. In order to maintain this action for damages, or for preventive relief by injunction, it is necessary that it should appear that the name adopted by the defendant is calculated to mislead the public into the belief that the defendant is selling the waters of Congress Spring, and that it is or has been engaged in selling the water of its own spring as that of the plaintiff's. The defendant denies that it has ever sold the water of its spring as water from the plaintiff's spring, *and no evidence is produced on the part of the plaintiff to show that the defendant has made such sales.* The injunction order should be vacated.

Wm. Tracy, for the appellant.

As to the *facts*, we claim that it was alleged and shown, *First.* That the Congress Spring at Saratoga had been known for many years, and its water had acquired a reputation as possessing medicinal virtues peculiar to itself, and not possessed by any other water; that it belongs to the plaintiff; and that its water, bottled, had, by the plaintiff and its predecessors in the ownership of this spring, become a well known article of commerce, throughout not only the United States, but the British provinces, the West Indies, South America and Europe. *Second.* That the word "Congress" is not, as alleged in the answer, "as applied to mineral water, used to denote the quality of the water, and not the origin or ownership, and is an arbitrary name which has by use come to be applied to mineral water in-

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dicating certain mineral properties or qualities." But that in fact it had for about seventy-five years been applied to distinguish the plaintiff's spring from all others; and that the term as applied to water, was simply descriptive of the fact that it was water naturally flowing from the Congress Spring, and not of its qualities, constituents or properties, and was not applicable to any other water. *Third.* That spring, by its name, with the proprietary trade-marks which had for many years been used by its proprietors in putting up and selling its water, had, before the existence of the defendant, become the property of the plaintiff, in so far as to prevent any other person from using those marks to interfere with the sale of Congress water. *Fourth.* That the defendant's trustees, for the express purpose of introducing the sale of other water as Congress, and because they thought that by introducing the name "Congress" after the words "High Rock," people would purchase it, not knowing that it was not Congress water, adopted this name; and to further impose upon the purchasers, purchased, as appears from their answer, from the widow of a former proprietor, after all her interest in the Congress Spring had ceased, the pretended right to use the trade-marks of the former proprietors; and that they now insist upon their right to use the same.

Under this state of facts, we submit that, as matter of law, the protection of its injunction should not have been overruled.

As to the *law*, we submit,

I. That the right of a party to a trade-mark, adopted to distinguish the article produced or prepared by him, in his trade or business, has been, both by the courts in England and this country, long recognized. It may be the use of his own name with any peculiar style of type or ornament; the name adopted for his place of business; any unappropriated fancy name to indicate ownership or origin, which does not, in its ordinary signification, des-

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ignite the same or a similar article, or simply indicate its quality, kind, texture, composition, destined use, or class of consumers. (*Wolfe v. Goulard*, 18 *How. Pr.* 64. *The Amoskeag Manuf. Co. v. Spear*, 2 *Sandf.* 599.) The doctrine of this case is, that every manufacturer and every merchant for whom goods are manufactured, has a right to distinguish the goods he sells by a peculiar mark or device, so that they may be known as his in the market, and that the public interest as well as his own, requires that he be protected in it; that one who affixes an imitation of this trade-mark to another article, commits a fraud upon the public and the owner of the mark, and equity will restrain him on the ground of preventing fraud. The imitation may be complete or partial; in either case, if it would probably deceive the public, it will be restrained. "In an imitation of the original mark upon an article or goods of the same description, the name of the proprietor may be omitted—another name, that of the imitator himself, may be substituted; but if the peculiar device is so copied as to manifest a design of misleading the public, the omission or variation ought to be wholly disregarded. Its object, we may be certain, was not to communicate truth, but to escape the penalty of falsehood. A fraud is intended, an unlawful gain is meant to be realized, but it is believed or hoped that an injunction may be avoided, and a claim for profits or damages repelled." (*Id.* p. 608. *See also, Id.* 619, 613, *for the application of the doctrine; Coats v. Holbrook*, 2 *Sandf. Ch. Rep.* 586, *and the notes, and cases there cited.*) The case holds, fully, the doctrine that one who assumes a particular name or mark to indicate the article he manufactures or deals in, is to be protected from the attempts of others to obtain his trade by simulating his marks. It is not enough that an examination of the marks may show a difference. The doctrine is, that when the imitation is calculated to deceive, it will be restrained.

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In our case it is shown affirmatively, and is not denied, that the simulation was intended to deceive and defraud the public, and to impose upon them as Congress water some other water. The various cases cited in the notes to the last mentioned case establish the principle. *Lewis v. Langdon*, (7 *Simons*, 421,) was as to the right by a survivor of a partnership to use its firm name as a trade-mark. It was held he might, and might restrain the executor of the deceased from using it. In *Pidding v. Howe*, (8 *Simons*, 477,) although an injunction was denied, yet the vice chancellor said the defendant "was not at liberty to make and sell a mixture of his own, under the same designation the plaintiff had appropriated," which was Howqua's Mixture. In *Croft v. Day*, (7 *Beavan*, 84,) the executors of the surviving partner continued the business under the firm name of "Day & Martin, 97 High Holborn." The defendant Day was a nephew, and associated with one Martin, under the firm of Day & Martin, labeling their bottles with an imitation of the old firm label, but substituting the royal arms for those of the firm, and inserting "90 $\frac{1}{2}$ Holborn Hill," in place of 97 High Holborn. Lord Langdale ordered an injunction, saying the defendants' contrivances were calculated to mislead the bulk of the unwary public with the impression that the new concern was connected with the old manufactory. *Hine v. Lart* (10 *Lond. Jurist Rep.* 106) was the case of the trade-mark "Ethiopian," on black cotton stockings. The answer denied that the plaintiffs were entitled to it, alleging its use by other parties before the plaintiffs. The vice chancellor said it was evident, from the defendant imitating the plaintiffs' mark, they knew they might gain an advantage by it to which they were not entitled, and he refused to dissolve the injunction. *Blofield v. Payne*, (4 *Barn. & Adol.* 410,) is a case to show that it is no answer that the simulated article is as good as the genuine. *Crowshay v. Thompson* (4 *Man. & Gran.* 357) was an action at law, for

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using the plaintiffs' trade-mark on iron. It was left to the jury to determine, first, whether the defendant's mark bore so close a resemblance that it was calculated to deceive *the unwary*; and, secondly, whether the defendant used the mark with the intention of supplanting the plaintiff.

Where one intentionally uses or closely imitates another's trade-marks, the law presumes it done fraudulently, to induce the public, or those dealing in the article, to believe the goods are those made or sold by the latter; and it is wholly immaterial that the simulated article is of equal or superior value. (*Taylor v. Carpenter*, 2 Sandf. Ch. 603.)

In *Clark v. Clark*, (25 Barb. 76,) the plaintiffs, J. Clark Jr. & Co., manufacturers of spool cotton, adopted, as a mark to be placed on it, concentric circles in gold and silver. In the inner circle the number of the cotton; in the second, "J. Clark Jr. & Co., Mile End, Glasgow;" in the next, "six-cord cabled thread, 200 yards;" in the outer circle, "sole agent, Wm. Wheelwright, New York." The defendants, J. & J. Clark & Co., adopted a similar device, but the inscriptions were, instead of "J. Clark Jr. & Co., Mile End, Glasgow," "Clark & Co., Seed Hill, Paisley," and in the outer circle, "sole agent, George Clark, New York." It was obvious to any one who would carefully compare the inscriptions, that they were different, and yet an ordinary reader would not discover the difference. The court say, (p. 79,) "An imitation of his mark, with partial differences, such as the public would not observe, does him the same harm as an entire counterfeit." The court held that J. & J. Clark & Co. had a right to sell thread under their own name, with the name of their agent, but that they must do this "so as not to appear to imitate the plaintiffs'." In *Bloss v. Bloomer*, (23 Barb. 604,) the court held that a contract by the plaintiff to furnish paper bags, with the plaintiff's trade-mark, to an-

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other, to put up seeds not raised by the plaintiff for sale, contrary to the spirit of the law, was a fraud on the public, and void. Judge E. Darwin Smith remarks, (p. 609,) "This court protects the title of the author or inventor of any names, marks, letters or other symbols, which any manufacturer, trader, or other person has devised and appropriated, or been accustomed to use in his trade or business, and restrains by injunction any unauthorized use thereof." In *Howard v. Henriques*, (3 Sandf. 725,) the plaintiff opened a hotel in New York, and called it "*The Irving House*." He had no sign, but the name was used on his bills and his cards. Soon, people indiscriminately called it the *Irving House*, and the *Irving Hotel*. The defendant then opened a hotel, calling it *The Irving Hotel*. The defendant was enjoined from the use of the name, by a justice of the superior court, and on appeal the injunction was affirmed, by all the judges. The court say: "We think that the principle of the rule is the same, *to whatever subject it may be applied*, and that a party will be protected in the use of a name which he has appropriated, and by his skill rendered valuable, whether the same is upon articles of personal property which he may manufacture, or applied to a hotel where he has built up a prosperous business." "One must not dress himself in another man's garments, and by assuming another man's name, endeavor to deprive that man of his individuality, and thus deprive him of the gains to which, by his industry and skill, he is fairly entitled."

In *Williams v. Johnson*, (2 Bosw. 1,) the plaintiffs, under the firm of "Williams & Brothers," manufactured a soap, to which they gave the name of "*Genuine Yankee Soap*." They put it up in a particular manner, with a label having an inscription, "*Genuine Yankee Soap, manufactured at Manchester, Conn., by Williams & Brothers, Chemists and Apothecaries*." The defendants afterwards commenced the manufacture of soap put up in similar form, but with

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a label bearing the inscription, "*Genuine Yankee Soap, manufactured at New York, by L. Williams & Co.*" The arrangement of the letters and form of packages was similar. An injunction was granted, restraining the defendant. On appeal, Judge Woodruff examines the rule, and shows the palpable attempt by the defendant to defraud the plaintiff. He says, (p. 6,) "It is true that the defendant has put upon his labels New York as the place of manufacture, and L. Williams & Co. instead of Williams & Brothers, as the manufacturers;" but (p. 8) it is so palpable as to admit of no reasonable doubt, that the devices employed by the defendant were calculated and intended by him to secure the benefit of the reputation which the plaintiff had acquired. He is, in this respect, entitled to no favor. The court, in considering the propriety of enjoining him, pending the litigation, will not feel called upon to be zealous to aid him by refined distinctions, so that he may evade the letter and violate the scope and spirit of the adjudged cases."

In *Corwin v. Daly*, (7 Bosw. 222,) Campbell procured gin from Holland, which he put up in bottles and cases, with a label, "Club-House Gin," in gilt letters. He transferred the right to use it to the plaintiff. The defendant bottled imported gin in square bottles, with "Club-House, J. T. Daly," blown on them, and a white paper label printed in black, "London Club-House Gin, sole importer Wm. H. Daly." After the defendant had the flasks with the letters blown on them the plaintiff had the letters "Club-House Gin, W. S. C.," blown on theirs. No fraudulent intent was charged in the complaint, proved by the evidence, or found by the court. The whole of the labels, and of the letters on the bottles, and of the boxes in which they were packed, were dissimilar. It was shown that the word Club-House had for a long time been used simply to denote a superior quality of gin, fit for use in club-houses. The court held that a dealer cannot be protected

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by adopting a name for an article which does not express its *origin, ownership* or place of manufacture or sale, but merely its quality, kind, texture or composition, destined use or class of consumers. It recognized the exclusive right, when the name is used to indicate the true origin of the article.

In *Burnett v. Phalon*, (9 Bosw. 192,) it appeared that in 1857 Burnett manufactured a hair oil which he named "Cocoaine." In 1858, Phalon, who had for several years manufactured a hair oil from cocoanut, put his up, calling it "Cocoine." The labels are very dissimilar. The only possible likeness is the two words "Cocoaine" and "Cocoine." The court affirmed a judgment giving a perpetual injunction, Bosworth, Ch. J., giving the opinion. Robertson, J., dissented, on the ground, only, that the proofs having shown that the defendant honestly adopted a French word to indicate the origin of the oil, that it was made from the cocoa nut, the case did not come within the rule. He however recognized the rule as before laid down.

In *McCardel v. Peck*, (28 How. Pr. 120,) the court recognized the rights of the real proprietor of a trade-mark, as the McCardel House, to permit it to be used by others, but held that without a valid agreement, the permission might be revoked.

II. The case here made by the plaintiff was within the rule. The defendant's trustees intended by the use of the word Congress, and the imitations of the various trade-marks used by the former proprietors of the Congress spring, to impose their water upon unwary purchasers as Congress water. 1. Their acts alone would show this; but in addition to that, we have the statement of their superintendent, that this was the reason why they adopted the name. 2. No advantage could result to them from the use of the word Congress, unless it would be to induce purchasers to suppose the waters came from the Congress spring. 3. The pretense set up in the answer, that Mrs. Clarke had sold

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the right to use the trade-marks, is answered by the fact that before the defendant had an existence the plaintiff had acquired from the proprietors of the Congress spring the whole property, with the stock of bottles, corks and boxes, with the proprietary marks, and the implements to make such marks upon them. The plaintiff became the owner of the Congress spring, August 5, 1865. The defendant only came into existence September 10, 1866.

III. The court, at special term, erred in vacating the injunction. The prayer of the complaint was to restrain the defendant from the use of the word "Congress," in selling the water it prepares, and from the use of any of the proprietary marks of the former owners of the Congress spring to induce the belief that the water it sold was Congress water. The plaintiff's claim is that the name Congress water is applicable to no water but the water of the Congress spring, which it owns; that to call any other water by that name, or by any labels or devices which have at any time been used to put up that water, or by an imitation thereof, calculated to deceive the unwary into the belief that it is Congress water, for the purpose of selling it, is a fraud upon the public and upon the plaintiff. In doing this it is not necessary for the plaintiff to show a right to use the marks of former proprietors; it is enough to show that the defendant may not use them to foist his articles on the market as Congress water. If the suggestion that the defendant might purchase and use the proprietary marks of the former owners is correct, then they might put up any sort of water, and use the bottles of Lynch & Clarke, and all their trade-marks, and sell it as Congress water, and thus either destroy the reputation of Congress water, or the plaintiff's business.

The learned justice, at special term, in his opinion, suggests that the plaintiff does not, in the complaint, aver that it purchased, with the Congress spring, the right to

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use all the former proprietors' trade-marks. Certainly it is not so stated in terms, and yet it is stated that the plaintiff purchased the *Congress Spring*, with its whole apparatus. No one pretends that it meant to carry on business under the firm of Lynch & Clarke, or either of the former proprietary names. But when it purchased the establishment, it is most manifest that those who sold it had no right thereafter to bottle up any water they chose and sell it as Congress water. The learned justice also alludes to the rule observed by courts, of preventing a plaintiff, by a trade-mark, from deceiving the public. It is submitted that the same rule applies to the permitting a defendant to deceive the public by using or imitating old trade-marks, not belonging to the article he deals in. It is also stated that the answer alleges that the trade-marks of former proprietors were not assigned to the plaintiff, and that the plaintiff's affidavits fail to furnish evidence to the contrary. Now, first, the answer was only verified on information and belief, and proves nothing; and, second, the affidavit of Johnson shows that a large quantity of bottles and corks, and bottled water, with the trade-marks, and the implements used in making them, were sold to the plaintiff's immediate predecessor.

A suggestion was made by the court, at special term, that the water of the Congress Spring having been called Congress water for over seventy years, the owners thereof have no exclusive right to all mineral waters, and therefore the owners of any spring of a similar water may rightfully call their waters Congress water. No one is shown to have ever known the term Congress water to mean anything but the water of the plaintiff's spring; no one is brought here to swear that any other water was ever sold as such. The defendant's superintendent, McCaffrey, simply swears he expects to prove that Putnam sold waters of his spring as "New Congress." In answer to all this, a large number of the most eminent apothecaries and

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dealers in Congress water for the last thirty-five years, distinctly swear that the name has no reference to the quality or constituents of the water, but is simply applicable to the waters of the plaintiff's spring. A large number of the inhabitants of Saratoga, residents there for seventy, fifty, forty, thirty-five, thirty, twenty-five, fifteen and ten years, swear to the same facts—that at Saratoga no other water than Congress Spring water was ever called Congress water. And, in addition to all this, it is shown directly that the defendant's trustees, with their eyes open to the dishonesty and fraud of using it, and simply with intent to deceive the public and supplant the plaintiff's business, adopted it. It was done purposely, fraudulently. It was just such an act as the statute of 1862, (*Laws of 1862, p. 513, ch. 306,*) was intended to prevent.

W. A. Beach and *A. Pond*, for the respondent.

I. The plaintiff has acquired no exclusive right to the use of the claimed trade-mark. The terms "Congress Spring," or "Congress Spring water," as applied to a natural element, are not appropriable as trade-marks. 1. To constitute a private trade-mark, it must denote either the origin or ownership of the article to which it is affixed. (*Upton on Trade-marks*, 86. *Amoskeag Manufacturing Co. v. Spear*, 2 *Sandf.* 599. *Fetridge v. Wells*, 13 *How. Pr.* 385. *Wolfe v. Goulard*, 18 *id.* 64. *Burgess v. Burgess*, 17 *Eng. Law and Eq.* 257.) The marks and devices claimed by the plaintiff lack these essential qualities. They do not in any sense indicate the origin or property of Congress Spring, or its waters. In the language of Justice Duer, in *Fetridge v. Wells*, (13 *How. Pr.* 385,) "they are used to designate the article itself, and have become, by adoption and use, its proper appellation." and are not, therefore, the subject of exclusive appropriation. This is so, eminently, of the words "Congress Spring." Evidently this is but the name of the spring itself, like "Avon Springs," "Lebanon Springs," "Sharon Springs,"

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and "Cheltenham Springs." All these are but the names of particular fountains, indicative only of the place where they issue. They distinguish the several springs, and nothing else. In neither is there any indication of *origin* or *ownership*. Nor is there in the term "Congress Spring water." That is but an arbitrary, inexplicit name, expressing no idea of property, or origin. Both are descriptive, by application and use, of the properties and qualities of certain mineral waters. 2. If it should be conceded that these terms indicate, in any sense, the *origin* of the spring, or its waters, as produced at a known locality, the plaintiff would not be helped. Because neither Congress Spring nor its water has any peculiar property, or effect, to distinguish it from the spring of the defendant, or its water. The medicinal qualities of both are substantially the same. The various titles designating the numerous fountains issuing at Saratoga are received as expressing the special attributes of a numerous class of fountains, having a common origin and cognate qualities. Each proprietor has the right to sell the waters, and to designate them by that name which appropriately signifies their common nature. (*Fetridge v. Wells*, 13 *How. Pr.* 355. *Stokes v. Landgraff*, 17 *Barb.* 608.) The proprietor of one of the springs at Avon, or Lebanon, or Sharon, or Cheltenham, might sell the waters of either by the name of "Avon water," &c., and with as much propriety as the plaintiff, claim the title as a trade-mark. The region of the Adirondack is renowned for its ores. Could an owner name the production of his bed "Congress ore," and use it, until it became descriptive of a certain *quality* or *class* of ore, and enjoin another owner of the same description of ore from vending it by the same name? Certainly not; because the term has become a *name* for an article which every owner has the right to sell by its appropriate title. 3. It is submitted that the doctrine of trade-marks has never been applied, and is not applicable, in letter or spirit, to the sale of spontaneous,

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natural products, of substantially the same nature. It is appropriate only to artificial compounds, or products, originated by the science, or skill or diligence of man. It is designed to protect the inventor of some new combination of substances, or some new product of skill; to secure to him something produced by his own genius, and the market he has secured by merit and industry. (*Upton on Trade-Marks*, 97, 8.) If this be the spirit of the doctrine, it is clearly inapplicable to the sale of natural products. They are not the creations of man's skill or industry. They are the gift of nature to all—free to all to sell and use. If a man adds to, combines or improves them, he may claim the advantage of his enterprise, by attaching to them marks or symbols which express their source and his title; but he cannot bottle, and name, the elements, and claim, exclusively, the new appellation by which they have become known in market. As well might one bottle the pure air of the mountain, naming it "Congress air," and prevent another from selling the same atmosphere, by the same name. The proprietor of the Congress Spring has no merit entitling it to a monopoly of name. Nor has water any such merit. The plaintiff sells what the earth produces. There is nothing in the thing itself, or in the form or mode of sale, originating with the plaintiff. He has discovered, produced, contrived, nothing entitling him to reward. 4. The argument is illustrated and fortified by the circumstance that for more than thirty years the terms "Congress Spring" and "Congress Spring water" have been used to designate another spring, and other mineral water, at Saratoga, other than the plaintiff's. "Putnam's, or New Congress Spring," and "Putnam's, or New Congress Spring water," are names familiar in market. The names are generic, and are applied to all mineral waters at Saratoga, possessing like properties.

II. To justify interference by injunction, the claimed trade-mark must be deceptively used—so as to mislead

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ordinary attention. (*Partridge v. Menck*, 2 Sandf. Ch. 622. S. C. 2 Barb. Ch. 101. 1 How. App. Cas. 547. *Merrimack Manufacturing Co. v. Garner*, 2 Abb. 318.) Mr. Upton thinks (pp. 220, 221,) that this rule is against the current of authority. But it must be accepted as the rule of this State, until the authority of the Court of Appeals is reversed. Mr. Upton conceives the true rule to be, that an injunction will go when the party fraudulently—with the design to deceive—uses the trade-mark in a manner to impose upon the unwary, although ordinary attention would detect the imposture. Accepting either proposition, the defendant is not amenable. All intention to deceive is disclaimed, under oath, and the mark it uses repels the aspersion, not only, but demonstrates that no one could be deceived. The High Rock Spring has been known as long as the Congress. Independent of its waters, it has been a celebrity from the remarkable petrification of its flowing water forming a conical surface curb, with a central orifice. The name attracts attention, at once. It is given a conspicuous place in the title adopted by the defendant. And the device of the rocky cone from which the waters issue, is prominently delineated. No fair mind can attribute to this a purpose to deceive, or consider it an imitation likely to mislead.

III. Whatever hesitation may be felt upon either of these propositions, this is not a case for an interlocutory injunction. The allegations of the complaint, imputing fraudulent imitation and deceptive similitude, are denied. The title of the plaintiff is not clear. It is disputed, upon substantial grounds. Equity will not interfere, under such circumstances. An injunction would be detrimental to the business of the defendant. It would be irreparable, inasmuch as the extent of damage would not be susceptible of legal proof. It is not needed. There is no allegation of irresponsibility. If finally beaten, the defendant is able to respond. The order should be affirmed.

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By the Court, JAMES, J. The doctrine of protection to trade-marks is now well established, and in the numerous decisions in this State, in other States and in England, the principles upon which the doctrine is based, have been stated and restated, until they ought to be correctly understood. "And yet in the application of these principles to particular cases," much difficulty often arises, and in some instances the true principle has so far been lost sight of, as to produce decisions apparently of a contradictory character. The principle which underlies this doctrine is, that he who by his skill, industry or enterprise has produced or brought into market or service, some commodity or article of use, convenience, utility or accommodation, and affixed to it a name, mark, device or symbol, *which serves to designate it as his*, is entitled to be protected in that designation from encroachment, so that he may have the benefit of his skill, industry or enterprise, and the public be protected from the fraud of imitators.

Property in trade-marks, *is not property* in the words, letters, marks or symbols as things, or as signs of thought, or as productions of the mind, like that of patent or copyright; but simply, and solely property as a means of designating things—the things thus designated being the production of human skill, or industry, whether of the mind, or the hands, or a combination of both; and this property has no existence apart from the thing designated, or separable from its actual use in accomplishing the present and immediate purpose of its being. (*Upton on Trade-Marks*, 4, 5.) If this is the true theory—the correct exposition of the principle of the law of trade-marks—it can have no application to a name given to a natural element in its natural state. I am not aware that the question of the application of the law of trade-marks to names given to spontaneous or natural products has, previous to this, ever come before the courts for adjudication. All the cases reported are cases where the marks infringed were used and applied to

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artificial compounds, products or manufactures originated by the science, skill, diligence or enterprise of man; and in all these cases, the principle of the law is stated and restated as applicable to protect the skill, industry and enterprise of mechanics, manufacturers and inventors; and hence only applicable to artificial products. Thus, in that most important and leading case, *The Amoskeag Manufacturing Co. v. Spear*, (2 Sandf. 599,) where the characteristics of trade-marks were clearly and fully stated, the court said: "Every manufacturer, and every merchant, for whom goods are manufactured, has an unquestionable right to distinguish the goods he manufactures or sells by a peculiar mark or device." So in *Stokes v. Landgraff*, (17 Barb. 608,) the court said: "The principle is well settled that a manufacturer may, by a priority of appropriation of names, letters, marks or symbols of the kind, to *distinguish his manufactures*, acquire a property therein as a trade-mark." In this case the court is asked to restrain the defendant from using the word "Congress" in connection with the word "water," or words "spring water." Conceding that the plaintiff, as owner of "Congress Spring," is entitled to the rights of its predecessors in the use of the word "Congress," and that it has heretofore only been used and applied to water in connection with said spring and its water, still, as the water is not an artificial product, and as there is nothing in the mode of bottling or mode of sale originating with the plaintiff or former owners, which the word "Congress" defines, designates or implies, it cannot be said that the plaintiff has any exclusive right to the use of that word in connection with that business, or in connection with the word "water" or words "spring water."

But there is another ground wherein we think the plaintiff fails to show a right to an injunction. "A name can only be protected as a trade-mark when it is used merely as indicating the true origin or ownership of the

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article offered for sale. Never when it is used to distinguish the article itself, and has become by adoption and use its proper appellation. (*Fetridge v. Wells*, 13 How. Pr. 385.) In the *Amoskeag Manufacturing Co. v. Spear*, the court said: "The owner of an original trade-mark has undoubted right to be protected in the exclusive use of all the marks, forms or symbols that were appropriated as designating the true origin or ownership of the article or fabric to which they are affixed; but he has no right to the exclusive use of any words, letters, figures or symbols which have no relation to the origin or ownership of the goods, but are only meant to indicate their name or quality. He has no right to appropriate a sign or symbol, which from the nature of the fact which it is used to signify, others may employ with equal truth, and therefore have an equal right to employ for the same purpose."

And again, in *Stokes v. Landgraff*, (17 Barb. 608,) the court said: "In all cases where names, signs, marks, brands, labels, words, or devices of any kind can be advantageously used to designate the goods or property, a particular place of business of a manufacturer, or a person engaged in trade, he may adopt and use such as he pleases which are adapted to that end and have not been before appropriated; but in respect to words, marks or devices, which do not denote the goods or property, or particular place of business of a person, but only the kind or quality of the article in which he deals, no property in such words or devices can be acquired."

The word "Congress" in connection with the word "water," or words "spring water," has no relation to, and does not indicate the origin or ownership of the article named. It only designates the article itself; and that designation has become, by adoption and use, its proper appellation. Therefore, within the principle above stated, and the authorities above cited, neither the plaintiff or its predecessors acquired, or could acquire, any property in

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the use of said word, or any exclusive right to the use of such word in connection with the word "water," or the words "spring water."

If it were conceded the word "Congress," in the application claimed for it, in this action, was a proper trade-mark, it is extremely doubtful, if upon the case as presented, an injunction could be sustained in favor of the plaintiff, because of want of title in the plaintiff to the right of its exclusive use. In the answer, that right and title is expressly denied, and is averred to be in a third party; and that allegation is not met in the moving affidavits. However that may be, we do not propose to put our decision upon that ground.

The order of the special term is affirmed on the distinct grounds, and for the reasons, above stated.

First. That the water of Congress Spring being a product of nature, the law of trade-marks has no application to protect the owner in the exclusive use of a name given to it.

Second. Because the word "Congress" neither indicates the origin, ownership, or place of the water, but only designates its name, and, from long use, its quality.

Order of special term affirmed, with \$10 costs and disbursements.

[ST. LAWRENCE GENERAL TERM, October 1, 1867. *James, Rosekrans and Potter*, Justices.]

ANNA ECKERT, administratrix &c. *vs.* THE LONG ISLAND
RAILROAD COMPANY.

One who is engaged in the performance of a legal duty, or of an act which, although not enjoined by positive law, yet which is meritorious and praiseworthy, or who is in the exercise of a legal right, and who, while so engaged, is injured through the negligence of another, is entitled to recover damages. The liability of a carrier of passengers, for negligence, is the same, although the injury resulting to the passenger, therefrom, is occasioned by his own act, where the peril is so great as to justify the act. *Per* GILBERT, J.

This principle applies, also, to persons who are not passengers, but who have been placed in peril by the negligence of others, and are doing their best to extricate themselves from such peril; and to persons who are injured while humanely, and without actual negligence, trying to save other lives placed in peril by the negligence of the carrier.

APPEAL by the defendant from a judgment of the city court of Brooklyn, and from an order denying a motion for a new trial.

The action was brought by the plaintiff, as administratrix of the estate of her deceased husband, Henry Eckert, to recover damages for injuries received by the intestate, by being run over, or struck, by the defendants' locomotive, or cars, in consequence of which injuries he died. The occurrence happened about half a mile from the village of East New York. Eckert and a friend were standing in front of a building on the south side of the defendants' railroad, and about fifty feet from the track, conversing, when a train of cars came in from the east, without a signal given, at a high rate of speed, (some of the witnesses stated from fifteen to twenty miles an hour,) and running with the engine reversed—that is, the butt end instead of the cow-catcher in front. The speed was not slackened, though the train was entering the thickly populated part of the village. There were five or six children sitting close to the track, and one child near the rails on which the train was approaching. Eckert suddenly discovered the train coming, and the position of the child, and supposing it in danger, instantly rushed tow-

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ards the child, seized it and carried it with him across the track in front of the train, which, at the time, was three or four feet off. He succeeded so far as to throw the child off the track and save its life, but the step on the part of the engine then in front struck his leg and back, and from the injury thus received he died that night.

On the trial, the defendants' counsel moved for a nonsuit, upon the ground that it appeared that the deceased's negligence contributed to the injury; that upon that question there was no evidence for the jury to pass upon; that it was a question of law to be determined by the court; and upon the further ground, that the defendants were guilty of no negligence contributing to the accident. The motion was denied, and the defendants' counsel excepted.

At the close of the testimony, the counsel for the defendants requested the court to direct the jury to find a verdict for the defendants. The court declined so to charge, and the defendants' counsel excepted. Other exceptions were taken, during the trial.

The jury found a verdict in favor of the plaintiff, for \$3500.

S. B. Noble, for the appellant.

I. The bare statement of the case ought to satisfy the court that the plaintiff cannot recover; her theory being that the deceased courted the very danger which resulted in loss of life, and her hope of sustaining the verdict and judgment resting solely upon the novel proposition that the voluntary act of her husband in exposing his own life, for the purpose of saving another from injury, entitles her to a recovery.

II. The defendants were guilty of no negligence contributing to the accident.

III. The plaintiff's intestate, by his want of caution, care, prudence and discretion contributed to the injuries which resulted in his death.

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IV. The exception to the admission of testimony was good, and so are all the exceptions to the refusal of the judge to charge as requested.

V. The verdict should be set aside; the order denying the motion for a new trial should be reversed; and as there is no possible theory on which the cause of action can be sustained, judgment final should be ordered for the defendants, with costs.

Geo. G. Reynolds, for the respondent.

I. The negligence of the defendants being very plain, upon our version of the facts, which must be taken to be established by the verdict, the only real question is, whether the deceased was, as matter of law, guilty of negligence contributing to the injury. Of course it would be gross negligence to rush across a track in front of a coming train, needlessly and voluntarily; but when human life is in danger and may be saved, such an act may be entirely justifiable. To take a risk *with an adequate object in view*, is not necessarily negligence. The act of the deceased was humane and noble, and ought not to be stigmatized by the law as faulty. It was necessary, in order to save the life of the child, and the deceased could not be called upon to measure accurately the chances to which he exposed his own. Negligence, to preclude recovery, must be *culpable*. (*Ernst v. Hudson River Railroad Co.*, 35 N. Y. Rep. 26. *Munger v. Tonawanda Railroad Co.*, 5 Denio, 255, 264, 5. *Fero v. The Buffalo and State Line Railroad Co.*, 22 N. Y. Rep. 213.)

II. The act of the deceased was rather instinctive than voluntary; and was made so by the fault of the defendants, and *their* negligence created the emergency. Having caused the circumstances of peril, the defendants are responsible, though the deceased may not have exercised the soundest discretion, in his efforts to obviate the consequences of their fault. (*Wilds v. The Hudson River Rail-*

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road Co., 33 Barb. 503, 507–509. *Collins v. Alb. and Sch. Railroad Co.*, 12 id. 492. *Buel v. N. Y. Central Railroad Co.*, 31 N. Y. Rep. 318, 319. *Stokes v. Saltonstall*, 13 Peters, 181.)

III. It was a fair question for the jury to determine, applying to it their common sense and experience, whether the deceased did not use that care and judgment which an ordinarily prudent man, with manly impulses, would exercise under the circumstances. He had a right to presume that the train would come through that neighborhood at a low rate of speed; (*see Newson v. N. Y. Central Railroad Co.*, 29 N. Y. Rep. 383, 390;) he could not tell at a hasty glance, from his point of view—nearly in front of it—how far off it was, nor how fast it was coming, and he may have had good reason to suppose that he had time to rescue the child without injury to himself. He would have been right in that calculation, if the train had been running at such a rate as he had a right to expect. “The absence of any fault on the part of the plaintiff (in this case the deceased) may be inferred from circumstances; and the disposition of men to take care of themselves, and keep out of difficulty, may properly be taken into consideration.” (*Johnson v. The Hudson River Railroad Co.*, 20 N. Y. Rep. 65, 71.) “The court is warranted in dismissing a complaint because of the plaintiff’s own negligence only when such negligence is clearly proved.” (*Oreed v. Hartmann*, 29 N. Y. Rep. 591.) The plaintiff has a right to have the issue of negligence submitted to the jury, where it depends on inferences to be deduced from a variety of circumstances, in regard to which there is room for a fair difference of opinion between intelligent and upright men. (*Ernst v. Hudson River Railroad Co.*, 35 N. Y. Rep. 9, 38–40.) This rule has been frequently affirmed in the Court of Appeals.

IV. The requests of the defendant were properly refused. The first six were each equivalent to asking a dis-

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missal of the complaint, and the seventh assumes, in the first place, that the deceased was guilty of some negligence; and in the second, that he could tell the speed of the train.

V. What the court charged in relation to the injury being occasioned or augmented by the reversal of the engine, was entirely proper. It was simply saying that if the jury found that to be negligence occasioning injury, they might give damages for it, if the deceased was free from negligence.

VI. The request of the defendants, to charge that notwithstanding the engine might have been run backward, or had been running at an unusual rate of speed, yet if the decedent was negligent on his part, and that negligence contributed to the injury, the plaintiff could not recover, was fully complied with by the court, and the exception has no foundation.

By the Court, GILBERT, J. The verdict of the jury established the fact, that the accident was caused by the negligence of the defendants, without any fault or negligence on the part of the deceased. The evidence is sufficient to sustain the verdict, so far as it involves the defendants' negligence. But it was not disputed, or susceptible of dispute, that, but for the voluntary act of the deceased, which exposed him to imminent danger, the accident would not have happened. The question, therefore, is whether this act, under the circumstances of the case, was, in contemplation of law, one of negligence, and therefore precluded a recovery. Our opinion is, that it was not. A person who is engaged in the performance of a legal duty, or of an act which, although not enjoined by positive law, yet which is meritorious and praiseworthy, or who is in the exercise of a legal right, and who, while so engaged, is injured through the negligence of another, is entitled to recover. It is not the coöperation of the act of the person

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injured with the negligence of the person causing the injury, that bars a recovery. To have that effect, the act must be an unlawful or negligent one. If lawful, and done with due care, prudence and caution, the defendant's negligence alone makes him liable.

In the case before us, the deceased made a noble and praiseworthy effort to save a little child, whose life was in imminent peril from an approaching train of the defendants', which was being run in a very negligent way. He succeeded in removing the child beyond danger, but in doing so lost his own life. The verdict of the jury frees him from all imputation of rashness, want of care and actual negligence of any kind. We are of opinion that the question was properly submitted to the jury, and that there is no rule of law which requires us to set aside the verdict.

It has been frequently held, that the liability of a passenger carrier for negligence will be the same, although the injury resulting to the passenger therefrom, is occasioned by his own act, where the state of peril will justify it. Such an act the law deems a natural and prudent precaution to extricate a person from peril, for which the carrier would have been liable. The principle is thus enunciated, by Lord Ellenborough, in *Jones v. Boyce*, (1 Stark. 402:) "If I place a man in such a situation that he must adopt a perilous alternative, I am responsible for the consequences." This is equally good law and good sense, and has been declared by the Supreme Court of the United States, (*Stokes v. Saltonstall*, 13 Pet. 181,) by our own courts, (*Eldridge v. Long Island Railroad Co.*, 1 Sand. 89; *Buel v. N. Y. Central Railroad*, 31 N. Y. Rep. 314;) and by the courts of some of our sister States, (*Ingalls v. Bills*, 9 Metc. 1; *Galena Railroad Co. v. Yarwood*, 15 Ill. Rep. 468; So: *W. Railroad Co. v. Paulk*, 24 Ga. Rep. 356.)

We can perceive no good reason for withholding the application of the principle to persons who are not pass-

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engers, but who have been placed in peril by the negligence of others, and are doing their best to extricate themselves from such peril, or to persons who, like the deceased, are injured while humanely, and without actual negligence, trying to save other lives thus placed in peril by the negligence of the defendant.

We have looked into the exceptions, but find none of them good. Upon the principle suggested, the case was well tried, and the judgment and order denying a new trial should be affirmed, with costs.

[KINGS GENERAL TERM, April 8, 1870. *J. F. Barnard, Gilbert, Tappen, and Pratt, Justices.*]

 LOSEE vs. MOREY and CRAMER.

Where the plaintiff and defendant, who are both men of fair character, and stand alike unimpeached, and are of equal credibility, being examined as witnesses, contradict each other directly upon a question of fact, and their testimony is totally irreconcilable, in the absence of other testimony, the case will stand evenly balanced, and the complaint will be dismissed.

But if the plaintiff is fully and circumstantially corroborated in his statement of the facts, by the written agreement of which a specific performance is sought, duly executed in form, and perfect in all its parts, even to the cancellation of the stamp, and by the testimony of the subscribing witness thereto; so that if the evidence of both parties should be stricken out, or disregarded, as equally balanced, the plaintiff's case would still stand well proved; this will justify a decree in favor of the plaintiff, if the facts thus proved be sufficient to warrant the relief asked for.

If a contract for the sale and purchase of lands has been fairly obtained, without misapprehension, surprise, mistake or the exercise of any undue advantage, and it be not unconscionable in its terms, the right of the parties to its specific performance is a settled and positive right, which a court of equity is bound to maintain and enforce.

The objection that a claim for specific performance is not of equitable cognizance, because the plaintiff has a perfect remedy at law, on the contract, in an action for damages, is not available in a case where the contract is for the purchase and sale of lands.

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In such a case, the vendee is not deemed to have a perfect remedy in an action at law for damages. He is entitled to proceed in equity, for a specific performance, although he may have another remedy at law, upon the contract.

As a vendor can maintain his action against the vendee, for a specific performance of the contract, if the latter refuses to accept the deed and pay the price agreed, so an action for a like purpose can be maintained by the vendee against the vendor. The rights of the parties to a contract of sale and purchase, to maintain such an action, are mutual.

Even inadequacy of consideration is no ground for refusing specific performance, unless it be so gross as to raise the presumption of fraud, unreasonableness, or great hardship.

One who purchases land with knowledge of another's right thereto under a contract of purchase, takes his title subject to such right; and that being so, either the deed to him will be set aside, or he will, with his wife, be directed to convey to the person having the prior right.

THIS was an action by Losee, a vendee, against Morey, the vendor, for the specific performance of a written agreement for the sale of real estate. Cramer was made a defendant as a subsequent purchaser from Morey.

A. Pond, for the plaintiff.

Merrill & Cowen, for the defendant Morey.

E. F. Bullard, for the defendant Cramer.

BOCKES, J. The first question to be determined is one of fact—whether the agreement mentioned in the complaint was executed and delivered, and became a valid, binding contract between the parties. The defendant admits that he signed the paper, but insists that it does not correctly or fully express the agreement between them; and he denies that it was delivered as a final and binding contract; but says that it was made and signed merely as a memorandum, from which another and perfect contract was afterwards to be prepared.

The parties, Losee and Morey, have both been exam

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ined as witnesses, and the evidence on this issue given by them is in direct conflict. It seems totally irreconcilable. Losee testifies to a full and complete understanding between them, as expressed in the contract, and also to its due execution and delivery; whereas Morey swears that the paper does not fully express the agreement, and that it was signed upon Losee's importunity and assurance that it should not be binding, but be used merely as a memorandum from which to prepare, in future, a perfect instrument. Both Losee and Morey are men of fair character, stand alike unimpeached, and, so far as I can judge, are of equal credibility. Did the case rest here, on their testimony only, the complaint should be dismissed. The plaintiff, in that event, would have failed to show a case of such undoubted fairness and perfect integrity as would entitle him to a decree in his favor. The case would then stand evenly balanced; in which event the plaintiff must fail in his action. But it is urged that the plaintiff is fully and circumstantially corroborated in his statement of the facts, and that his case is clearly proved by other evidence than his own. As matter of corroboration, the contract itself is presented, duly executed in form, and perfect in all its parts, even to the cancellation of the stamp. This of course is entitled to some consideration, (*Boyd v. Colt*, 20 *How.* 384;) and the evidence of Harvey Losee, the subscribing witness to the contract, is minute and circumstantial, and supports the plaintiff's statements. If we should strike out or wholly disregard the evidence of both the plaintiff and the defendant, on the ground that one balanced the other, the plaintiff's case would still stand well proved by the most unequivocal, and so far as I can judge, by perfectly reliable testimony. But I do not propose here to go extensively or minutely into an examination of the evidence. My duty, in deciding this case, only requires that I should declare in whose favor there is a clear preponderance of proof. As to this there

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can be but one opinion, and I can but pronounce in favor of the plaintiff. On the proof, as given before me, I must find that the agreement was duly executed and delivered, and became a valid and binding instrument between the parties. Any other conclusion would, I think, be against the clear weight of evidence.

The next question is whether the plaintiff is entitled to have this contract specifically executed.

As a general rule, the specific performance of contracts rests in the discretion of the court. It is not, however, an individual or arbitrary discretion, but a judicial discretion, which conforms itself to general rules and settled principles. The right to have specific performance is a positive right, neither to be exercised or withheld capriciously, or simply at will. When all is fair, and the parties deal on equal terms, it is a universal rule, in equity, to enforce contracts for the sale of lands specifically, at the demand of either the vendor or vendee; and in such case it is as much the duty of the court to decree specific performance of the contract as it is to give damages for its breach. (*Willard's Eq.* 280. *Story's Eq.* §§ 746, 751. 9 *Vesey*, 608. 12 *id.* 395, 400. 3 *Cowen*, 445. 6 *Bosw.* 245.) In the last case cited the court remarks that the discretion to be exercised in these cases, "is governed, for the most part, by settled rules; and where a plaintiff is seeking a relief to which by such rules he is clearly entitled, and no substantial defense to his claim is established, the relief may not be capriciously denied." It follows, therefore, that if a contract for the sale and purchase of lands has been fairly obtained, without misapprehension, surprise, mistake or the exercise of any undue advantage, and it be not unconscionable in its terms, the right of the parties to its specific performance is a settled and positive right, which the court is bound to maintain and enforce. It is insisted, in the next place, that the case is not of equitable cognizance, because the plaintiff has, as is urged,

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a perfect remedy at law, on the contract, for damages. This objection is not available in a case like this, where the contract is for the purchase and sale of lands. In such case the vendee is not deemed to have a perfect remedy in an action at law for damages. He is entitled to the land, according to the terms of the purchase. A compensation in damages will not afford adequate relief; "for the peculiar locality, soil, vicinage, advantage of markets and the like conveniences of an estate contracted for, cannot be replaced by other land of equal value." (*Vice Ch. Sandford, in Best v. Stow*, 2 *Sandf. Ch.* 298, 301. *Story's Eq.* § 746. *Will. Eq.* 279.) In this class of cases the party is entitled to proceed in equity for a specific performance, although he may have another remedy at law upon the contract. This has been repeatedly decided. (5 *Paige*, 235. *Id.* 268–283. 2 *Comst.* 60. 21 *Barb.* 381; affirmed in *Ct. of App.* 20 *N. Y. Rep.* 189.) In this last case cited the amount of the damages was stipulated by the parties. (21 *Barb.* 383.) Judge Grover, in speaking of this objection, says: "The clause fixing the damages to be paid by the party in default does not constitute a defense to this action." (20 *N. Y. Rep.* 189.) True, this remark occurred in a dissenting opinion; but the dissent was on other grounds, and the court must have been with the learned judge in this view, or specific performance could not have been ordered, in that case. (12 *Wend.* 393.) The instances are numerous in the books, where the vendor, in a contract for the sale of lands, has maintained an action for its specific performance, against the vendee; yet in nearly all, if not in every one, he had his action at law on the contract, either for the purchase price agreed to be paid, or for damages. So the chancellor says, in *Brown v. Haff*, (5 *Paige*, 235,) "a suit in this court against the vendee, to compel a specific performance of a contract to purchase land, has always been sustained as a part of the appropriate and acknowledged jurisdiction of a court of equity,

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although the vendor has, in most cases, another remedy by an action at law upon the agreement to purchase." The right to recover at law the price agreed to be paid for the land will not deprive the vendor of his action for specific performance; neither will his right to recover damages effect that result. He may not wish the lands, even with the damages, but may prefer to have them off his hands, and he has a right to require that the vendee shall take them and pay the stipulated price. It is said, in *Fry on Specific Performance*, (§ 23 :) "It might appear at first sight, that inasmuch as money in exchange for the estate is what the vendor of land is entitled to, he has a complete remedy at law, and therefore could not sustain a bill for the specific performance of the contract. But on further consideration it will be apparent that damages will not place the vendor in the same situation as if the contract had been performed; for then he would have got rid of the land and of all liabilities attached to it, and would have the net purchase money in his pocket." In this case it is clear that Morey, the vendor, could have maintained his action against the vendee, Losee, for a specific performance of the contract, had the latter refused to accept the deed and make payment as he had agreed. The numerous cases in the books where actions for specific performance have been maintained by the vendor against the vendee, on contracts like that here under consideration, admit of no possible doubt in regard to it. If so, then the vendee, Losee, may maintain his action, for a like purpose, against Morey. The rights of the parties to the contract to maintain such action are mutual. (6 *Paige*, 288. *Fry on Spec. Perf.* § 23. 10 *Mod. R.* 503-6. *Will. Eq.* 267. 2 *Barb. Ch.* 439. 2 *Barb.* 608. 8 *id.* 527.) Assuming that the preponderance of the evidence is with the plaintiff as to the due execution and delivery of the agreement, is there any excuse shown for the defendant's refusal to comply with its terms and stipulations? Yielding

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the question of its due execution and delivery as a contract—not as a memorandum merely, for future reference—is there any evidence of fraud, concealment, misrepresentation, mistake, surprise, want of consideration or inequity in any respect, which requires that the vendor should be relieved from its performance according to its terms? I am unable to perceive any. If the contract be deemed to be duly proved, it should be executed according to its stipulations, the only substantial excuse for the defendant's refusal to perform being that it was not executed and delivered as a binding instrument. If that defense be found against him, he stands without excuse in refusing to carry out his agreement. The fact that Morey was able, a few months after, to get an advance of \$600, affords no ground why he should be relieved from its performance. Even inadequacy of consideration is no ground for refusing specific performance, unless it be so gross as to raise the presumption of fraud, unreasonableness, or great hardship. (6 *John. Ch.* 222. 3 *Cowen*, 445. *Hoff.* 37. 21 *Barb.* 381.)

The defendant Cramer purchased with knowledge of the plaintiff's right, and therefore took his title subject thereto. That being the case, either the deed to him should be set aside or he should, with his wife, convey to the plaintiff. (1 *Barb. Ch.* 273. 5 *John. Ch.* 225, 231. *Story's Eq.* § 788. *Will. Eq.* 269.)

The plaintiff is entitled to judgment for a specific performance of the contract mentioned in the complaint, with costs against the defendants Morey and Cramer. The use of the premises since the plaintiff was entitled to possession should be deducted from the amount of the purchase price agreed to be paid, and the value of such use must be determined on a reference for that purpose, unless the parties agree upon such value; in which case I can insert it in my finding and decision.

The plaintiff's counsel will draw up the finding and de-

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cree, to be settled by me, in case of disagreement, on two days' notice. There must be some special clauses in my finding, and also in the decree, as to the mortgage which it seems Mr. Cramer has paid off, making it necessary, perhaps, to have the attendance of counsel on the settlement of them.

[SARATOGA SPECIAL TERM, August 8, 1865. *Boches*, Justice.]

BUCHANAN *vs.* COMSTOCK and PARKS.

In an action between partners, for a settlement of the copartnership affairs and to recover a balance claimed by the plaintiff to be due to him, a receiver will not be appointed, to sell stock owned by the parties jointly, though in proportions dependent on the state of the partnership accounts, before it is judicially determined how much of the stock belongs to each party; where no insolvency is alleged, and the defendant denies the entire equity of the complaint, and offers and consents that one half of the stock may be transferred to the plaintiff, and to give security to indemnify him for any balance he may establish in his favor.

THIS was an appeal by the defendant Comstock, from an order made at the Albany special term, appointing John W. Thompson, Esq., receiver of 193 shares of stock of the Pioneer Paper Company, with power to sell the same, "if in his judgment the interests of the parties will be promoted by the sale," "at public auction," and requiring "all the parties to this action to forthwith assign and deliver said stock to said receiver, so that new scrip therefor may be issued to said receiver."

The stock originally belonged to the copartnership firm of S. A. Parks & Co., which was composed of Solomon A. Parks and the plaintiff Buchanan. On the 17th June, 1863, Parks sold and assigned his interest in all the stock originally owned by S. A. Parks & Co., being 198 shares thereof, to the defendant Comstock, which transfer was

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under seal and duly stamped. After this transfer to Comstock, the latter brought an action against the plaintiff Buchanan, to set aside a transfer on the books of the Pioneer Paper Company, of 113 shares of said stock which Buchanan had previously caused to be made to himself, and for which he had obtained new scrip, and delivered up the old scrip, on the ground that such acts were fraudulent and void as to Comstock, as assignee of Parks' interest in, and title to, the stock. On the 2d day of March, 1864, the said Comstock recovered a judgment in said action, declaring him the assignee and owner of Parks' interest in said stock, and setting aside the fraudulent transfer of the same to Buchanan, solely, and declaring the same canceled. After the commencement of the action of Comstock against Buchanan, last mentioned, Buchanan commenced this action to settle the copartnership matters of S. A. Parks & Co., claiming that he had advanced more than Parks—paid more debts; that the partnership was indebted to him in a large amount; and that he was therefore entitled to most of the stock belonging to the firm. The answer of Comstock denied the extent of his claim, and offered, in case it should turn out that the firm was indebted to him in any amount, so as to constitute any lien on the share of the stock so transferred to him by Parks, to pay it off, and discharge the lien, and thus relieve his share of the stock from such claim.

The case had been brought to trial before the referee, and the trial nearly concluded, when the plaintiff moved for the appointment of a receiver to sell the stock in question, before it was determined judicially whether the firm of S. A. Parks & Co. was, in fact, indebted at all to the plaintiff in any sum whatever, and if so, before the defendant Comstock, who was entirely responsible, could have an opportunity, to pay off and discharge such indebtedness.

The defendant Comstock offered, in his affidavit, to

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divide the stock equally with the plaintiff, and give any security to pay off any sum which Buchanan might establish against his share, and tendered a bond in the sum of \$10,000, duly executed, to pay and secure to him any sum he might establish against his share of the stock. But the court, at special term, (Justice MILLER presiding,) made the order in question, and Comstock appealed therefrom to the general term.

A. Pond, for the appellant.

The order should be reversed. I. The plaintiff utterly fails to make out a case authorizing the appointment of a receiver. There is no dispute as to the title to the stock in question, and the only question is whether the firm of S. A. Parks & Co. is indebted to the plaintiff, so as to give the latter any claim to, or lien upon, the share transferred by Parks to Comstock, to secure such indebtedness. To ascertain that, the plaintiff should go on with his action now pending before the referee, and the trial of which is nearly completed, and finish it up; and then, if there is anything his due, and there is any occasion for a receiver, in order to collect such debt, it will be time enough to appoint a receiver to sell. But at this stage of the action, when it does not appear certain that there is any debt to pay, it would be an extraordinary proceeding for a court of equity, where no insolvency is alleged, to interfere by appointing a receiver to sell Comstock's share of the stock in question, to discharge a lien which may possibly be hereafter declared to exist against it. This would emphatically be reversing the scripture rule, which declares that, "sufficient unto the day is the evil thereof." It is equally against law. In *Goodyear v. Betts*, (7 How. Pr. 189,) Harris, J., said: "The principle upon which the court directs property in controversy to be placed in the hands of a receiver pending the litigation is, that the party applying for a receiver has shown a probable interest in the

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property, and that there is danger of its being lost without such protection. The plaintiff charges, upon information and belief only, that the assignee is not the owner of property or effects of any description sufficient to pay his debts and liabilities. This allegation, undenied, would be sufficient to show that the property was in danger and required the appointment of a receiver. (*Connah v. Sedgwick*, 1 Barb. 210, and cases cited.) But the defendant's affidavits satisfactorily show that the plaintiff is mistaken in respect to the pecuniary condition of the assignee. There is, therefore, no ground for taking the assigned property out of his hands before the rights of the parties are determined by the judgment of the court." We say, here, that no insolvency being alleged, there is therefore no ground for the appointment of a receiver to take Comstock's property out of his hands, before judgment is rendered, determining the rights of the parties. So also in *The People v. The Mayor, &c.* (10 Abb. 116,) which was ejectment for land, where an injunction and receiver had been granted, on appeal from the order, the court say, on reversing the order: "Were this an equitable action in both form and substance, I think I would not appoint a receiver on the matters set up in this complaint. It is true an apparently good title is shown in the plaintiff to the premises in question. This is one essential element in a complaint, to entitle the plaintiff to a receiver, but it is not all. It must also appear that the appointment is necessary to protect the property, or its rents and profits, *pendente lite*. When the defendant really liable is responsible, then no such necessity can, under ordinary circumstances, be made to appear." In this case, I repeat, there is no pretense that Comstock is not entirely responsible, and no reason exists, therefore, for appointing a receiver. And see, to same effect, *Power v. Lester*, (12 Abb. 285, 295.) I repeat, therefore, that there are no grounds presented in the moving affidavits, for the appointment of a receiver.

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II. Nor is the result changed at all, by the attempt of the plaintiff's counsel to call the stock in question partnership property, and thus endeavor to apply to it the principle applicable to partnership property. The assumption is erroneous. The purchase of Parks' interest in this partnership stock by, and its transfer to, Comstock, terminated the joint title to the stock, of Parks & Buchanan, and also its character as partnership property, and made Comstock and the plaintiff tenants in common of the stock, subject, of course, to an accounting between Buchanan and Parks. But it was no longer partnership property. (*Mumford v. McKay*, 8 Wend. 442. *Murray v. Murray*, 5 John. Ch. 60, 70. *Walsh v. Adams*, 3 Denio, 125.) The stock, therefore, no longer being partnership property, the principle applicable to such property does not apply, but instead thereof the ordinary principle applies, that where no insolvency exists, or is alleged, no receiver will be appointed, pending the action, nor until judgment is obtained declaring the rights of the parties. (*See cases cited to 1st point.*)

III. But if it be conceded that the stock is in fact partnership property, the result is the same, and no receiver should be appointed in this case; nor ought Comstock's stock to be sold. His title to an undivided half of the stock in question, subject to the accounting between the partners, has been conclusively established by the judgment in the action in his favor against the plaintiff and the Pioneer Paper Company, and the plaintiff at least is estopped to deny the effect of that judgment. Very well, then; if Comstock is both able and willing to pay off and discharge any lien or claim the partnership or Buchanan may have against his half of the stock, and thereby release or redeem it from the incumbrance, why should he not be allowed so to do? But what law, and especially what equitable principle is it, that prohibits a man the privilege of discharging, by payment, any lien there may be on his

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property, be it legal or equitable, and thereby enabling him to retain the title to the property to himself, and prevent its sale, for the sole and only purpose of raising the money wherewith to discharge the lien or incumbrance upon the property? I maintain there is no such law, or principle. This property is susceptible of easy and equal partition and division. It is not like a horse or house, perhaps incapable of division, and therefore making a sale necessary in order to effect partition between the tenants in common. No, it is capable of easy and exact division, without injury to either party. And in regard to real estate, the law is that the same shall be partitioned between the parties as matter of right. "The statute authorizes a sale only where it shall appear to the court that the premises are so circumstanced that a partition cannot be made without great prejudice to the owners." (2 R. S. 330, § 81. *Van Arsdale v. Drake*, 2 Barb. 601.) Such, also, is the rule at common law. (*Haywood v. Judson*, 4 Barb. 228.) And by analogy, the rule is the same in equity, as regards partition between tenants in common, of personal property; that is, that a sale will only be ordered, when partition is "impracticable." (*Tinney v. Stebbins*, 28 Barb. 290.) Hence, the stock being such that it can be easily partitioned, and Comstock being entirely willing and able to pay whatever indebtedness, if any, constitutes a lien upon his share thereof, most certainly a court of equity will not order it sold, against his protest. Under such circumstances, a sale is not necessary to protect or secure any right of the plaintiff, and Comstock offers now to divide the stock with Buchanan, and secure any claim which the latter may have, if any, on his share. And Comstock also tenders a bond to secure Buchanan any sum he may hereafter establish in the action, constituting a lien on his share of the stock; and if that is not sufficient security, he offers to furnish any additional security required by the court. This is all Buchanan can rightfully claim, and more than the

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court ought to require. (*Dunham v. Jarvis*, 8 Barb. 88. *The People v. Mayor*, 10 Abb. 111, 117. *Power v. Alger*, 13 id. 296. *Goodyear v. Betts*, 7 How. 187.) Besides, the amount, if any, due to Buchanan, from the firm, is small. The case of *Dunham v. Jarvis*, above cited, was a case of partnership, where the court refused a receiver, and took a bond.

IV. But suppose it proper to appoint a receiver; the order is erroneous. 1st. No sale is necessary. The property is not perishable, and there is therefore no occasion to sell it. 2d. But if there is occasion to sell it, the court ought to order it sold, and not refer it to the receiver to determine the matter. If the property is worth what is claimed, to wit, \$150 a share, or about \$30,000, it is very evident that the receiver, who is to receive his fees if a sale is made, will be a very indifferent person to determine whether the interests of the parties require a sale. He will be able to determine, pretty quick, that his own interest requires a sale of the stock, that he may receive his fees for the sale. It is like the fugitive slave law, now repealed, which provided a fee of \$10 if the slave was returned to slavery, and only \$5 if he was declared free. This provision in the order appealed from, is the nearest approach to the fugitive bill, of any law or order since the war commenced. The order itself should share the fate of the law referred to. 3d. Neither should the parties be required to transfer to the receiver. It can be of no use, unless it is expected the receiver shall vote at elections of trustees. But certainly that will be inequitable, to take the joint property, and put the title into the hands of a man to wield either, 1st. Exclusively for Buchanan's benefit; or, 2d. For Comstock's benefit; or, 3d. Use half of it for the benefit of one and half for the benefit of the other. This last would neutralize it, and leave it, practically, where it is now.

But the order should be reversed *in toto*, with \$10 costs

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to the defendant Comstock, for opposing the motion at special term, and \$10 on this appeal, and the plaintiff be required first to establish his claim, in the action.

E. F. Bullard and J. H. Reynolds, for the respondent.

By the Court, ROSEKRANS, J. If we look solely at the verified allegations of the complaint, in this action, it is difficult to discover upon what principle, or for what purpose, the order for the appointment of a receiver of the property of the firm of S. A. Parks & Co. was granted. The substance of those allegations is as follows: That in 1856 the plaintiff and the defendant Parks composed the firm of S. A. Parks & Co., and the firm had real and personal property with which it conducted the business of manufacturing paper, until March, 1858, when their factory was destroyed by fire. Each partner was to have interest on the excess over one half of the capital invested, and they were to share equally the profits and loss. That on the 1st day of April, 1858, the plaintiff's capital exceeded Parks' more than \$10,000, and the firm had lost \$8000, including the loss by fire. Shortly after the loss, the partners agreed that the plaintiff should advance or procure means to rebuild the works, and that as soon as practicable the plaintiff should get a corporation formed for the purpose of taking the property of the firm; that the property should be sold to such corporation; and that out of the proceeds of the sale the plaintiff should have the right to withdraw sufficient to reimburse the amount of his capital and advances, and expenses of rebuilding, and the balance of the liabilities against the firm; and if any assets remained, it should be divided *pro rata* between the parties, according to their shares of the capital. By this agreement it will be perceived that Parks was to receive no part of his capital until the plaintiff had been reimbursed *the whole of his capital*, and that out of the balance

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of assets, after paying the plaintiff his entire capital and all his advances, and all the liabilities of the firm, Parks was not to be reimbursed his capital to the extent that such balance of assets would reimburse it, but was only to receive such proportion of said balance of assets as his capital bore to the capital invested by the plaintiff; and the plaintiff was to receive the residue of such balance of assets.

The complaint further alleges that the plaintiff advanced further capital to rebuild the works of the firm, became indebted for the residue, and the work of rebuilding proceeded while measures were being taken to organize the corporation, and the corporation referred to, called the Pioneer Paper Company, was organized about 1st April, 1859, for manufacturing purposes, with a capital of \$30,000. That in March, 1859, the assets of the firm were worth about \$20,000; and that by charging the plaintiff with all the former debts as assumed by him, the firm, on the 1st April, 1859, would owe the plaintiff upwards of \$20,553.46, and Parks would then owe the firm \$1753.46 and upwards. The complaint proceeds to state that about March, 1859, the partners agreed that most of the firm assets should be sold to the corporation as soon as it was organized, and that the firm name should be used to subscribe for stock in the corporation; that with a portion of the proceeds of the assets of the firm, the stock should be paid up; that the plaintiff should have the right to sell said stock to pay the debts of the firm or take the stock for his own benefit at par, and credit the firm with that amount towards the division and winding up of the firm affairs; and that the plaintiff would raise money upon the stock or otherwise, pay the firm debts, and bring the firm matters to a close; and after the payment of the firm debts and refunding to each party his capital and advances, it was agreed that the balance of said stock, if any, should be divided *pro rata* between the parties, according to their interests in the

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firm. That in pursuance of this agreement, the plaintiff subscribed for \$19,800 of said stock in the name of the firm, and the assets of the firm were sold to the corporation, and \$19,800 of the proceeds were appropriated for the payment of said stock.

The complaint proceeds to state that during 1859 the debts remaining against the firm were pressing, and the firm could not meet them without the sale of stock, and that in December, 1859, the firm transferred 113 shares of the stock to the plaintiff, individually, to have and to hold to his individual benefit, and that this transfer was made pursuant to a previous agreement between the parties, that the plaintiff should have the right at any time to take stock at par, as so much toward refunding his share in the capital of said firm.

The complaint alleges that the plaintiff did pay the debts of the firm, in pursuance of said understanding, and has proceeded to wind up and close the business of the firm, and has credited the firm with 198 shares of stock at par, \$19,800, and has charged the firm with all the debts paid by him; that he sold five shares of the stock, in 1860, which the defendant Comstock has since bought, and that Parks had full knowledge of the affairs of the firm, and had full and free access to the books of the firm and of said corporation, and knew that the plaintiff had taken said stock on the division as his own property, as aforesaid, and made no objection thereto, until about February, 1863, and afterwards looked over the matter, and was satisfied the plaintiff had done right in taking said stock, and so expressed himself, and assented to it, and ratified the transfer, and agreed that the plaintiff should retain the stock to the amount of his interest and capital in the firm, and only claimed sufficient of the stock to pay his interest in the firm, if anything was coming to him upon a final settlement, calling the stock par.

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The complaint proceeds to allege that Parks has looked over the firm matters, and concluded that \$2000, at least, remains due to the plaintiff, over and above the whole of the 198 shares of stock. It is also alleged that upon a full accounting of the partnership matters, the said sum of \$1753.46 and upwards, before alleged to be due from Parks on the 1st April, 1859, with interest from that date, is due from Parks to the plaintiff. The complaint alleges that about June, 1863, Parks pretended to sell to the defendant Comstock, and *to assign to him conditionally*, a portion of his interest in the firm of S. A. Parks & Co., and that Comstock now claims that there is some interest in said firm owing to him.

These are substantially all the allegations of the complaint; and they show that the entire property and assets of the firm of S. A. Parks & Co. were invested in the 198 shares of stock of the Pioneer Paper Company; that the debts of the firm have all been paid by the plaintiff, and charged to him on the books of the firm; that the plaintiff has wound up and closed the business of the firm, and that with the consent of Parks, and pursuant to agreement, the plaintiff has taken the 198 shares of stock on the division, and that Parks subsequently looked over the firm matters and ratified the transfer of their 198 shares of stock to the plaintiff, and conceded that a balance of at least \$2000 is due the plaintiff. They also show that the only assets of the firm not disposed of or adjusted, is the balance due the firm from the defendant Parks on the 1st of April, 1859, of \$1753.46, and interest from that date.

And the plaintiff, without averring that the alleged transfer of the 198 shares of stock which was not perfect to vest in him not only the real, but also the apparent title to the stock, or that any one questions or proposes to question his title to it, asks, as part of the relief to which he is entitled, "that he may be adjudged to hold said stock transferred to him by said S. A. Parks & Co., as his indi-

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vidual property, and that he be only charged with the same at par; and that the defendant be enjoined from voting upon any of said 198 shares of stock originally transferred to the plaintiff, as stated in the complaint, (except the five shares sold to Comstock,) or from transferring any portion of said 198 shares of stock, except said five shares; and that a receiver may be appointed of said joint property of S. A. Parks & Co., including all stock now held by them or by said defendants, or either of them, or by the plaintiff and Comstock jointly, which originally belonged to S. A. Parks & Co. In the light of the allegations of the complaint, and its omissions of allegation, that portion of the prayer for relief above recited, appears absurd. And the prayer for the appointment of a receiver of any portion of the 198 shares of stock, as joint property of the firm of S. A. Parks & Co., which is expressly alleged to have been long since transferred to the plaintiff, by the firm, is also absurd.

There can be no ground for a receiver in the case of joint ownership of property, when the joint owner who applies for the appointment has the property in his own possession and under his control. (*Smith v. Lowe*, 1 *Edw.* 33.) The injunction, as prayed for, could not be granted, as there is no allegation in the complaint of threatened or apprehended acts sought to be enjoined, and a receiver of property as joint property of the plaintiff and defendants, which is alleged to be the individual property of the plaintiff, and his right to which, as individual property, is not alleged to be questioned, nor his possession of it alleged to be disturbed, or threatened to be disturbed, was never, so far as my knowledge extends, appointed, or asked to be appointed, by the court. Indeed the 198 shares of stock mentioned in the complaint are not, so far as the allegations of the complaint show, a subject of this action. The plaintiff, taking his statement of his case as true, owned these shares as his individual property before suit, by per-

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fect transfer, and no one, according to his allegation, seeks to dispute his title.

But the whole equity of the plaintiff's case is denied by the answer, and there is nothing in the voluminous papers used upon the motion to maintain the claims made by the plaintiff. The affidavit of Parks, set out in the case, in the matter of the election of trustees of the Pioneer Paper Company, at fol. 165, states *that since* he assigned his interest he has examined the firm accounts, and that if the plaintiff is charged with the whole 198 shares of stock at par, there was a balance due to the plaintiff at the date of the assignment, but Parks does not sustain the allegation that the transfer of 113 of the shares of stock to the plaintiff at par was with the consent of Parks, nor does he corroborate the statement of the plaintiff as to his claim of right to charge the 198 shares of stock to himself at par; besides, this claim of the plaintiff was found by the court, in the action of Comstock against the Pioneer Paper Company and Buchanan, not to be correct so far as the transfer of the 113 shares of the stock to the plaintiff was concerned, and it was declared that such transfer was without the authority, consent or approval of Parks, and that he never ratified, sanctioned or confirmed the same. The judgment in that case also required Buchanan to surrender up the certificates for the 113 shares of stock, to be canceled, and directed the Pioneer Paper Company to cancel the transfer to the plaintiff, and to issue scrip for that stock to the plaintiff and the defendant Comstock, jointly, and they are declared to be joint owners of said stock, subject to all equities existing at the time of the assignment to Comstock, between Parks and Buchanan as members of the firm of S. A. Parks & Co. It appears that this direction of the judgment has been complied with, and this stock now stands in the name of the plaintiff and Comstock. The remaining 85 shares may be assumed to stand in the name of the firm of S. A. Parks

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& Co., and by the rule established as to the 113 shares, the plaintiff and the defendant Comstock are joint owners of those shares, subject to the equities mentioned above. The balance of \$24,913.07 which the plaintiff claims in this case to be due him from the firm of S. A. Parks & Co., according to his own testimony taken in this case, appears to have been made up without crediting the firm with the dividend received by him upon the stock, amounting to \$5444, and the defendant Comstock insists that upon a fair accounting in relation to the affairs of S. A. Parks & Co., nothing will be found due to the plaintiff. It appears, too, that in October 1864 a dividend of fifty per cent was declared on the 198 shares of stock, amounting to \$9900, which the defendant Comstock consents that the plaintiff may draw, and this, with one half the stock at par in the plaintiff's name, charged to him, and the \$5444 dividend received by the plaintiff, which he has not charged to himself, would cancel the balance which the plaintiff claims against the firm. Besides, the defendant Comstock offers and consents that one half of the 198 shares may be transferred to the plaintiff, and the other half to himself, and to give any security that the court shall require to indemnify the plaintiff for any balance he may establish in his favor against the firm of S. A. Parks & Co. Under the circumstances, a denial of the entire equity of the case made by the complaint, an adjudication unreversed that a material statement in the plaintiff's complaint is unfounded, an absence of any suggestion that the defendant is irresponsible, an offer on the part of the defendant Comstock which, if accepted, would indemnify the plaintiff against any possible loss, I cannot see the propriety of putting the property, of which the plaintiff and defendant are joint owners, into the hands of a receiver. It seems to me to be doing injustice to the defendant, in any case, to decide the whole of the disputed facts in favor of the plaintiff, in advance, without proof to sus-

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tain his allegations, and especially unjust when the defendant proffers unquestioned security to the plaintiff against any possible loss.

The irregularities which have heretofore occurred in the election of trustees of the Pioneer Paper Company, arising in part out of the opposite claims to the 198 shares of stock, cannot affect the question whether a receiver should be appointed. Those irregularities have already been corrected by judicial decision, and the rights of the parties to the stock until the final determination of this action have been established by the judgment of this court, and it is to be presumed that they will be exercised in accordance with the judgment.

I think the order of the special term should be reversed, with costs.

[ST. LAWRENCE GENERAL TERM, October 3, 1865. *Rosekrans, Bockes and James*, Justices.]

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BUCHANAN vs. COMSTOCK and PARKS.

It is not admissible to substitute or introduce a new and distinct cause of action by way of supplemental complaint.

The matters to be introduced by supplemental complaint must be consistent with, and in aid of, the case made by the original complaint.

Where an action was brought to settle and determine the partnership rights of the plaintiff and one of the defendants, and not to determine anything between such defendant and a co-defendant, under an agreement between them; *Held* that the plaintiff could not by a supplemental complaint change the action in its entire scope and purpose, by bringing in and substituting a new controversy—a new and independent cause of action springing out of a transaction occurring since the commencement of the action, between the defendants, with which the plaintiff had no connection.

It is a good objection to a supplemental complaint, that it proposes to introduce new matter of controversy, which would complicate the action, with no advantage to the parties.

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MOTION by the plaintiff, for leave to file a supplemental complaint.

E. F. Bullard, for the motion.

A. Pond, opposed.

The motion should be denied. I. So far as regards matters between Parks and Comstock, and the rights of the latter under the assignment of June 17, 1863, the order striking them out of the original complaint, is conclusive here. The merits of that decision are not open to discussion here. If not right, the order should have been appealed from. But it was right in itself, and, besides, was acquiesced in, and not appealed from.

II. So far as the conflicting claims to stock, and the control of the affairs of the company, by means of the state of the title thereto, are concerned, the decision of the general term on the motion for a receiver, and reversing the order appointing a receiver, is conclusive here. The effect of that decision is, that such matter has nothing to do with this action, to settle the partnership affairs of S. A. Parks & Co., and hence, so far as that matter is concerned here, that decision controls.

III. But the motion should be denied, for the reason that it seeks to bring forward and litigate in this action, matters and claims which the plaintiff pretends to have purchased and acquired from Parks, more than two years after this action was commenced and the trial began, which matters have no relation to the subject matter of this action. It is not sought to bring forward this new matter in aid of, and to support, the original action, but for the purpose of introducing into this action a new and independent cause of action between Parks and Comstock, growing out of the assignment by the former to the latter, of his interest in the S. A. Parks & Co. stock; and to which claim the plaintiff alleges he has acquired title, by

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transfer from Parks, some two years after this suit was brought. There is no precedent, nor is there any principle, authorizing the granting of such relief. A supplemental pleading is not, under the Code, any more than under the former practice, proper, for the purpose of bringing forward a new and independent case. It was only allowed in aid and support of the original cause of action. (*Watson v. Thibou*, 17 Abb. 184. *Milner v. Milner*, 2 Edw. 114. 1 Hoff. Ch. Pr. 396.)

IV. But the matter sought to be brought forward by the supplemental bill is the same as that embraced in the suit of *Parks v. Comstock*, now pending in the Court of Appeals. In that action, the general term of the Supreme Court has decided that Parks had no cause of action against Comstock; and that judgment is conclusive until set aside. Parks cannot, by transferring his claim to Buchanan, galvanize it into life, and introduce it into an action in favor of Buchanan against these defendants, brought for an entirely different purpose. But if it can be done, the order allowing it ought to provide that the appeal to the Court of Appeals, in that case, should be abandoned.

BOOKES, J. Motion for liberty to put in a supplemental complaint. This action was commenced in 1863, to settle the partnership affairs of S. A. Parks & Co., a firm consisting of Parks and Buchanan. They held, as partners, 198 shares in the capital stock of the Pioneer Paper Company, and the action was brought chiefly, if not entirely, to determine the rights of the parties in regard to these shares, which depended on the state of the partnership accounts. Comstock became interested in the partnership matters by an assignment to him, by Parks, of his (Parks') interest in the 198 shares of the stock. The assignment by Parks to Comstock was on the 17th June, 1863; hence it became necessary to determine the state of the partner-

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ship business at that date, inasmuch as the rights of Comstock, acquired by the transfer to him, were subject to the equities existing at the time, between the partners. Incidental to the general and main object of the action, the plaintiff prayed for an injunction, and for the appointment of a receiver.

The defendant Comstock answered the complaint—interposed various matters of defense; also set up his interest in the 198 shares of stock; claimed to own an undivided half, and offered to pay any sum which, on an accounting between the partners, should be found to be a charge or lien on such undivided half.

The defendant Parks put in no answer.

The cause was referred to a referee, and several hearings have been had before him.

Notwithstanding the assignment by Parks to Comstock was in form absolute, of all right in and to the 198 shares, a separate instrument, called in the papers a defeasance, was at the same time executed between them, under which Parks retained an interest therein. This interest, whatever it may be, Parks has recently transferred to the plaintiff, and the latter now moves for liberty to put in a supplemental complaint, setting up such transfer to himself, and such other averments as will call for a determination of the rights of Parks and Comstock under the defeasance. The other matters sought to be introduced into the pleading are now waived.

1st. I think the motion must be denied, because it is not admissible to substitute or introduce a new and distinct cause of action by way of supplemental complaint. The matters to be introduced by supplemental complaint must be consistent with, and in aid of, the case made by the original complaint. (17 *Abb.* 184. 2 *Edw.* 114.) This action was brought to settle and determine the partnership rights of Parks and Buchanan, not to determine anything between Parks and Comstock under the agreement be-

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tween them. By this motion it is sought to bring in and substitute a new controversy, a new and independent cause of action, springing out of a transaction between them with which Buchanan had no connection. In the original complaint the plaintiff claims an accounting in regard to the partnership affairs of S. A. Parks & Co. By the supplemental complaint this is assumed to be unnecessary, and the controversy is sought to be changed in subject and in theory. It will be readily perceived, by referring to the prayer for relief in the supplemental complaint, that it proposes to change the action in its entire scope and purpose. This is not admissible under the settled practice of the court.

2d. The introduction of this new matter of controversy, if admissible, would complicate the action, with no advantage to the parties. The action is now plain and simple, both in form and theory. The issues are formed and the case partly tried; and I think the ends of justice will be best subserved by excluding from the action matter foreign to the subject of controversy stated in the original complaint.

3d. It is urged that inasmuch as the plaintiff has acquired Parks' interest in the subject matter of the action, and is willing and offers to meet and satisfy all the conditions of the defeasance, the accounting is unnecessary, and that the substitution of the supplemental complaint in the place of the original, will save great expense and useless labor. But this hypothesis rests on the construction to be given to the defeasance. The plaintiff's counsel contends that the "*surplus*" spoken of in the instrument, and which it was there agreed should "*remain for future disposal*," whatever it might be, was to belong to Parks, and that Comstock had no interest in it; consequently that he had no right to insist upon an accounting for the purpose of determining the surplus on which he had no claim. But is this so? Has Comstock no right or interest in this

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“*surplus?*” I think I am not at liberty here to hold that the construction contended for is correct. At any rate I am unwilling so to hold, in view of the opinion of the general term in *Parks v. Comstock*, wherein this clause is to some extent considered and discussed. Judge JAMES, in speaking of this “*surplus*” which was to “*remain for future disposal*,” says: “The fair construction of the defeasance is, that if any surplus remained from the interest in the 198 shares, after defraying the litigation and reimbursing Comstock for the shares of stock assigned to Parks, it was in some manner to be *divided between them*,” &c. And again, he says: “The assignment was a valid transfer to Comstock of Parks’ interest in the 190 shares of stock; the defeasance showed it was transferred to enable Comstock to ascertain the extent of that interest, and when ascertained, if of any value, to be disposed of *between them*. Therefore, Comstock had an interest in said stock.” The opinion of the general term seems very distinct to the effect that Comstock had rights in the “*surplus*” which might “*remain for future disposal*,” but to what extent, or what was his portion, is not there declared. It follows from this view that there must be an accounting in order to determine what that surplus is. Comstock’s right and interest can be found in no other way. This necessity is not obviated by the fact that all rights are now in Buchanan, except such as Comstock holds. The accounting is now the first step towards the adjustment of the rights between Comstock and Buchanan; and until this is accomplished, it is impossible for Buchanan, as it was impossible for Parks before his transfer to the latter, to make an offer of performance of the conditions of the defeasance with a view to acquire title to the stock, as proposed in the supplemental complaint, which is based on the theory that no examination into the affairs of the partnership of S. A. Parks & Co. is necessary. As was said in the opinion of the general term from

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which I have made extracts, until the accounting is had, the extent of the interests of the parties cannot be known, nor their rights determined, nor their equities adjusted. Nothing can, therefore, be gained by an attempt to avoid the accounting now in progress under the original pleadings. It must of necessity proceed to a termination, unless the parties can arrange their difficulties by an amicable settlement.

4th. Some of the matters sought to be introduced into this action by the supplemental complaint, were embraced in the suit between Parks and Comstock, now pending on appeal in the Court of Appeals; and many averments with a view to the procuring of a receiver, are also introduced, which have been considered and held useless or improper, by this court, on appeal from the order appointing a receiver herein. (*See opinion of Justice Rosekrans, S. C. ante p. 575.*) Such matter and averments clearly ought not to be now brought into this suit. I am satisfied the motion for liberty to put in the supplemental complaint should be denied.

It seems very plain that the first step towards a termination of the various, protracted and pertinacious litigations between these parties, is to have the accounts of the partnership of S. A. Parks & Co. taken and stated in this action. This will determine the rights of the parties as to the stock in the Pioneer Paper Company—the real matter in controversy—and put the parties in a position to arrange the difficulties between themselves, or if that be impossible, it will give the court a basis for a final adjudication as to their rights.

Motion denied.

[SARATOGA SPECIAL TERM, May 12, 1866. *Bockes*, Justice.]

BURCHFIELD vs. THE NORTHERN CENTRAL RAILWAY COMPANY.

The defendant was running a railroad belonging to another corporation, and using it for the ordinary purposes of a railroad, for its own benefit, under and by virtue of a written agreement with the owners, and for a period of time only fixed by the terms of a lease made to another corporation, and assigned to the defendant, who agreed to pay the rent reserved in said lease. *Held* that the defendant was a *lessee* of such road, within the meaning and intent of the general railroad act of 1850, and the act of 1864, amending the same and extending its provisions to the *lessees* of any railroad. And that as such lessee, it was liable for the value of a cow killed by its engine upon the track, in consequence of the defendant's neglect to maintain fences and cattle-guards as required by the statute.

The term *lessees*, in the statute, is to have such a construction as was intended by the legislature, to meet the then known and existing condition of things; to meet the case of parties using a road, as the substitute for the owners, and exercising the rights of owners, under some right or permission, for a consideration to be paid to the owners.

THIS was an appeal from a judgment of the county court of Schuyler county. The action was for killing the plaintiff's cow, by the defendants, upon the track of a railway. The action was commenced in a justice's court, and from the judgment there entered, there was an appeal to the county court, where there was a verdict for the plaintiff. A motion was made for a new trial and denied, and from the judgment entered on the verdict an appeal to this court was taken.

M. M. Mead, for the plaintiff.

J. McGuire, for the defendants.

By the Court, POTTER, J. The defendants are a corporation organized under the laws of the State of Pennsylvania. The railroad on which the injury happened was the road of a corporation called the "Erie Railway Company." The defendants were using the said railroad under a contract as to the terms and considerations named therein for its use.

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The main question to be decided, in this case, arises upon an objection taken on the motion to nonsuit the plaintiff, on the ground that the defendant was not the *owner* or *lessee* of the road in question, and that no negligence being shown, it was not liable for the injury sustained by the plaintiff.

The portion of the road, in question, was the "Chemung Branch" of the Erie Railway Company. There was no actual negligence proved against the defendants which, at common law, would create a liability for the injury complained of. The liability, if any, arises from the statutes. And the construction to be given to these statutes must determine this case.

The defendants were running a road which they had permission from the owner to use, and the plaintiff's cow was wrongfully upon the track of the road, and was killed by reason thereof; and it is claimed that by the terms of the contract of the *defendants* with the Erie Railway Company, the owners of the road, the defendants were neither the *owners* or *lessees* of the road, and therefore are not brought within the provisions of the statutes that create the liability for such accidents.

The first statute relied upon is that of 1850—a general statute—the 44th section of which requires every railroad company to erect and maintain fences on the sides of their road, of a certain height and strength, with openings, or gates, or bars therein, and farm crossings, on the road, for the use of the proprietors of the lands adjoining such railroad; and also to construct and maintain cattle-guards at all road crossings, suitable and sufficient to prevent cattle and animals from getting on to the railroad. Until such fences and cattle-guards shall be duly made, and maintained, "the *corporation* and its agents shall be liable for all damages which shall be done by their agents or engines to cattle or animals thereon." Under this act it was held, in *Parker v. Rensselaer and Saratoga Railroad Co.*,

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(16 *Barb.* 318,) that the defendants, not being the *owners* of the road, but being merely running their cars upon the road of the Schenectady and Saratoga Railroad Company, who were the owners, were not liable; that the duty to erect and maintain fences was confined, by construction of this statute, to the proprietors or owners of the road. Assuming this to be a sound construction, it was, to say the least, a very strict construction, of a remedial statute. But it is not quite in the spirit or views of construction given by the Court of Appeals, in *Tracy v. The Troy and Boston Railroad Co.*, (38 *N. Y. Rep.* 437.) They say, "the passage of this act being induced by public considerations, and its purpose being to protect the traveling public, and the owners of domestic animals along the line of their road, it should receive a liberal construction to effectuate the benign purpose of its framers. A rigid and literal reading would, in many cases, defeat the very object of the statute, and would exemplify the maxim that the letter killeth, while the spirit keepeth alive. Every statute ought to be expounded not according to the letter, but according to the meaning," &c., &c. I am satisfied that this is a sounder rule, especially when applied to a remedial statute induced by public considerations. Whether by reason of the decision in the case of *Parker v. Rensselaer and Saratoga Railroad Co.*, (*supra*,) or of the fact that various railroad companies became themselves insolvent, and went into the hands of receivers, or trustees who ran them, or took them on lease, or from other causes, the remedy given as above against the owners would result in a failure of the object intended to be secured by the act of 1850, certain it is, the legislature of 1864, for some reason, and doubtless on like public considerations, by an express provision, extended the provisions of this statute so as to create a like liability against the *lessees* of any railroad, including not only other railroad companies

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who may be such lessees, but any person or persons who may be such lessee or lessees. (*Laws of 1864, p. 1335, § 2.*)

This limits our examination to the only real question in the case, viz: Was the defendant a *lessee* of this road, within the meaning and intent of these statutes? The defendants were running this road, and using it for the ordinary purposes of a railroad, for their own benefit, under and by virtue of a written agreement with the owners, and for a period of time only fixed by the terms of a lease made to another corporation, and assigned to them, the defendants; which lease, so assigned, is not produced by the defendants in evidence; but by the agreement which was produced and proved, the defendants agree to pay the rent provided for in said lease so thereby assigned to them. There is some obscurity in the evidence produced, as to what part of the Erie Railway the said assigned lease covers; but this obscurity it was the duty of the defendants to remove. They were in possession of the railroad upon which the injury happened; they proved it to belong to another corporation, and that they were using it under a written permission, license or lease. They claimed that by the terms of their contract it did not bring them within the terms of the statute, to make them lessees. It was undisputed that they killed the plaintiff's cow by the running of their engine drawing a train of cars; that they were operating the road under their written contract; that there was a neglect to maintain fences and cattle-guards as the statute requires. They were legally liable, if they are lessees. The term *lessees*, in this statute, is to have such construction as was intended by the legislature, to meet the then known and existing conditions of things; to meet the case of the parties using a road, as the substitute for the owners, exercising the rights of owners, under some right or permission, for a consideration to be paid to the owners. It would result in a technical evasion of the spirit and intent of this benign

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statute, if a private agreement could be made between the owner and the user or occupant of a railroad, and could be put into such a form as to escape being called a lease, and thus private parties, between themselves, could defeat the object of a statute enacted from public considerations and for public protection. Courts will not permit such injustice, by mere technicality. -Indeed, so far as we are permitted to know of this agreement between the defendants and the Erie Railway Company, it was really strictly and technically a lease; they, the defendants, agreeing to pay rent upon the lease assigned to them; and though the agreement restricts the use of the road, and also permits others to use it in part, it is equally a lease of the use, to the extent granted. It is, at all events, a lease so far as public and individual rights are concerned.

The judgment should be affirmed.

[THIRD DEPARTMENT, GENERAL TERM, at Plattsburgh, July 5, 1870. *Miller*, P. J., and *Potter* and *Parker*, Justices.]

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THE PEOPLE, *ex rel.* David Wilbur *et al.* plaintiffs in error,
vs. JOHN EDDY *et al.* defendants in error.

Whenever a statute grants the power to do an act, with an unrestricted discretion as to the manner of executing the power, all reasonable and necessary incidents in the manner of executing the power are also granted.

Hence, although a statute is very summary in its grant of power, and fails to prescribe the form of proceeding to effect the desired object, it is not for that reason unconstitutional and void.

The legislature is not restricted in power, by the constitution, from controlling or changing the term, or the fees, of an office; or from abolishing an office created by it, altogether. The incumbent possesses no vested right in an office.

Where any commissioner, appointed under the act of March 31, 1856, authorizing certain towns to subscribe to the capital stock of the Albany and Susquehanna Railroad Company, (*Laws of 1856, ch. 64.*) and the acts amending

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the same, (*Laws of 1857, ch. 401; Laws of 1859, ch. 384,*) to borrow money on the credit of the town, shall refuse or neglect to perform any part of the duties specified therein, his office will thereupon become vacant, and the county judge, upon the application of twelve resident freeholders, and upon proof of the fact to his satisfaction, has jurisdiction to appoint some other person to fill his place.

The act of 1859 (*ch. 384*) was in *pari materia* with the statutes of 1856 (*ch. 64,*) and of 1857 (*ch. 401,*) which authorized the appointment of commissioners and prescribed their duties; and they must all be construed together, as constituting one system, or one act.

And where, upon an application by twelve resident freeholders, to the county judge, and proof to him, he found, as facts, that commissioners appointed under the acts made a contract to sell stock subscribed for by them in the name of a town, on certain conditions, one of which was, that the purchasers should first have the use of the stock, to be voted upon at a future election of directors of the corporation, for certain persons named in the contract of sale; that they refused to sell the stock for cash, at par; and that they sold the same on credit; and the county judge thereupon adjudged and determined that it was the duty of the commissioners, if they sold the stock, to sell it for cash, at par; that for their neglect or refusal to perform that duty their offices had become vacant; and that the defendants should be appointed to fill their places; *Held* that the findings were legitimate, and the adjudication right.

On a common law *certiorari*, the court may examine the case upon the merits, as well as upon the question of jurisdiction.

The statute obviously intended to intrust the power of deciding the question whether commissioners appointed thereunder have refused or willfully neglected to perform any part of the duties of their offices, to the county judge; and while his action, like the action of all other inferior officers, can be made the subject of review by the Supreme Court, on *certiorari*, the practice, in that respect, as to reviewing facts, is, by analogy, to be governed by the same rules as are observed on appeals and *certioraris* from inferior jurisdictions in other cases, viz: if there is evidence in the case which will, when fairly weighed, sustain the decision, this court will not interfere upon the ground that in their opinion a stronger case has been made out by the unsuccessful party.

Where it appears, from the return of a county judge to a writ of *certiorari*, that he was deceived and misled by the fraudulent pretences of the relators, upon a former motion, and that the decision thereon was obtained from him by such fraudulent pretences, such former decision will not be a bar to the second proceeding; and his final judgment may be reviewed upon the merits.

THIS case comes here upon *certiorari* to the county judge of Otsego, to review his proceedings in declaring va-

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cant the offices of the relators, as commissioners of the town of Milford, in said county, to borrow money on the bonds of the town, to be invested in the stock of the Albany and Susquehanna Railroad Company; and in appointing the defendants to fill said offices. The proceeding was instituted upon the written application of twelve or more freeholders of said town of Milford, to appoint the defendants such commissioners, on the ground that the relators, who had been appointed to those offices, had refused or willfully neglected to perform certain of the duties required of them as such commissioners; and that their offices had thereby become vacant. The county judge, thereupon, on the 27th day of August, 1869, granted an order directing the relators to show cause, before him, on the 31st day of August, then instant, why the said offices should not be declared vacant, and the prayer of the petitioners granted. The relators appeared by counsel, and objected to the jurisdiction of the judge, and to his manner of proceeding. These objections were overruled. They further objected, that the same question had been once heard and determined against the application, for the same alleged cause; which was also overruled. Affidavits were then read on both sides; after which the motion was again made, to dismiss the proceedings upon each of the grounds before set up, which was also denied. On the 1st day of September, 1869, the county judge made an order, reciting that proof to his satisfaction had been produced before him, "that the relators had refused, or willfully neglected, to perform their duties as commissioners of the town of Milford, in refusing to sell or dispose of the capital stock of the said railroad company, purchased and owned by said town, for cash, according to law, for its par value, and in attempting to sell the same conditionally, on credit; whereby the office of such commissioners has become, and is hereby declared vacant; and I do therefore hereby, as such county

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judge, pursuant to the authority given by the said acts, appoint said John Eddy and Amos F. Waters to be commissioners to carry into effect the purposes of the said act," &c. The other facts, material to be mentioned, will sufficiently appear in the opinion.

E. Countryman, for the relators.

E. M. Harris, for the defendants.

By the Court, POTTER, J. The proceeding which we are reviewing is entirely a statute proceeding. It confers somewhat unusual powers upon a judicial officer; and, like all other statute authority which may seem to be interfering with existing rights, must be strictly construed. The proceeding is instituted, and the order of the county judge made, under section 5 of chap. 384 of the laws of 1859, (p. 907,) which provides as follows: "In case any commissioner, under the act passed March 31, 1856, as amended April 14, 1857, shall refuse or willfully neglect to perform any part of the duties specified therein, or required by this act, his office shall thereupon become vacant, and upon *proof of the fact*, to the *satisfaction* of the county judge, * * he shall appoint some other person to fill his place, in the manner now provided by law."

General and well settled rules in the construction of statutes will, I think, be sufficient, if applied to this, to determine its meaning. One of which rules is, that the intention of the lawgiver is to be deduced from the whole and every part of a statute, to be taken and compared together; and the real intention, when ascertained, will always prevail over the literal. (*People v. Draper*, 15 N. Y. Rep. 532. 1 Kent's Com. 162.) The courts are, in the first place, to contemplate the law as it previously existed; next the necessity and probable object of the change, and then give such construction to the language used by the

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law makers as to carry their intention into effect, so far as can be ascertained from the statute itself. (*Donaldson v. Wood*, 22 *Wend.* 395.) Though the intention of a statute is to be collected from the words employed, when words are not clear and explicit, the intent is to be gathered from the occasion and necessity of the law, and the causes which moved the legislature to enact it. (*Dwarris on Statutes*, 562.) And statutes are always to be construed with reference to the common law, and other statutes in force at the time of their passage. (*Howe v. Peckham*, 6 *How. Pr. R.* 229, 232.) It is to be presumed that the legislature intended to make no innovation upon existing statutes or common law, further than the case absolutely required, (1 *Kent's Com.* 464,) and words of common use are to be taken in their natural, plain, obvious and ordinary signification and meaning. (*Id.* 462.)

Guided by these rules, what was the intent of the statute in the grant of power to the county judge, in the section above cited? This statute was in *pari materia* with the statutes of 1856 (chap. 64,) and of 1857 (chap. 401,) which authorized the appointment of commissioners, and prescribed their duties; and they must all be read together, as constituting one system, or one act.

In the act of 1856, sections 1 and 10, power was given to the county judge, in case a *vacancy* should happen, by reason of *death, removal from the town, resignation, refusal to serve, or otherwise, to fill the vacancy*, upon the written application of twelve resident freeholders, &c. These provisions are not changed by the act of 1859. They remain in force, so far as relates to *vacancies* from those causes; and the act of 1859 was intended to add to the causes which produce a *vacancy*, viz: If any commissioner shall *refuse*, or willfully neglect *to perform*, any part of the duties specified therein, or required by this act, his office shall thereupon become *vacant*, and upon the proof of the fact to the satisfaction of the county judge, he shall appoint

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some other person to fill his place. It is seen that no provision is made in these statutes, for the county judge to *take proof* of a vacancy, by reason of death, removal, resignation, or mere refusal to serve. These causes would be palpable, and obviously require no proof or judicial action; but when and after there has been an acceptance of the office by the commissioners, if there has been a refusal to perform any of the duties, or a willful neglect to perform such duties, the public interests suffer more than if there was a vacancy for any of the other causes. There would be an incumbent, not only useless, but actually hurtful to the public interest, and the amendment is made for such a contingency, by invoking judicial action upon the case. This statute, it is true, is very summary in its grant of power, and fails to prescribe the form of proceeding to effect the desired object; but it is not for this reason unconstitutional, or void. Whenever a statute grants the power to do an act, with an unrestricted discretion as to the manner of executing the power, all reasonable and necessary incidents in the manner of exercising the power are also granted. The act, in itself, confers a power not more summary in its nature, nor does it involve more important interests, than that conferred upon justices of the peace by statute, in the removal of tenants of real estate. The one involves the right of possession of an office, with its benefits and emoluments, the other the possession of real estate, with its use and income. The legislature is not restricted in power by the constitution, from controlling or changing the term or the fees of an office, or from abolishing an office created by it, altogether. The incumbent possesses no vested right in an office. (*People v. Devlin*, 33 N. Y. Rep. 273.) The law under which they entered upon the duties of their offices, is not a contract, express or implied. The statute in question, then, is to be considered as passed as a remedial statute, in view of existing defects in the law, and is to be construed in con-

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nection with existing law, and as intended to change, not only existing statutes, but also the common law. We are therefore to look at the general scope and design of the law in question; to look at the evil intended to be remedied, and the benefit to be attained; and then so construe the law as to accomplish the object the legislature had in view in its passage. (22 *N. Y. Rep.* 88.) This object, it appears to me, is obvious. We cannot close our eyes to the common public intelligence of the day, as to notorious delinquencies in the agencies of railroad and other corporations, and as to abuse of official action. And we cannot read the amended act in question without the discovery that its provisions were made to meet either existing or probable future abuses, and to provide a summary method of disposing of one of that class of evils. The forum selected for this purpose, in theory at least, is a safe depository for the exercise of this power; as conservative, as intelligent, and as pure as any that could be named; and while it is, with humiliation, to be admitted, that even the judiciary, or exceptional members of it, have not escaped the public charge of being reached by the overshadowing influence of railroad corporations, through their agencies, yet it may safely be asserted that the danger arising from this source is only that to which history and experience has shown that all human agencies and institutions are subject—the passions and infirmities of man; that while the people, the sovereign power, may, by superior art and address of candidates for judicial position, sometimes commit mistakes in selection, the power remains in their hands to correct the error; and that even bad men, it is believed, if any such occupy judicial positions, are, in a degree, restrained from great mischief by a measure of pride for the judicial department, and an ambitious desire to avoid severe public criticism. These *obiter* remarks are not called forth by anything that appears, or is charged, in this case. On the contrary, there is an

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evident appearance of intent fairly to adjudicate upon the question we are reviewing.

1. I assume, then, that the county judge of Otsego county, by virtue of the acts referred to, had jurisdiction of the question so placed before him; that this was the tribunal appointed by statute to determine whether the relators had refused to perform the duties of the office to which they had been appointed, and whether they had willfully neglected to perform such duties; and that he did determine such question.

He held and adjudged, in effect, as appears from his return to the writ, that it was the duty of the relators, as commissioners of said town, if they sold the stock, to sell it for cash at par. He found as a fact, in effect, that they made a contract to sell the said stock on certain conditions; one of which was, that the purchasers should first have the use of the stock to be voted upon at a future election of directors of the company, for certain persons in the contract named; that they refused to sell the stock for cash at par; and that they sold the said stock on credit.

If these findings are legitimate, and can be sustained, the adjudication is right; if they are not, the order should be reversed.

Upon the authority of the case of *The People v. The Board of Police*, (39 N. Y. Rep. 506,) and *The People v. Board of Assessors of Albany*, (40 N. Y. Rep. 154,) and the authorities cited therein, it will now become our duty to examine the case upon the merits, as well as upon the question of jurisdiction, which we have examined. The statute obviously intended to intrust the power of deciding the question, whether these officers had refused to perform any part of the duties of their offices, and whether they had willfully neglected to perform any part of such duties, to the county judges; and while their action, like the action of all other inferior officers, can be made the subject of review by this court, on *certiorari*, I apprehend

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that the practice in this respect, as to reviewing facts, is, by analogy, to be governed by the same rules as are observed in appeals and *certiorari* from inferior jurisdictions in other cases, viz., if there is evidence in the case which will, when fairly weighed, sustain the decision, this court will not interfere upon the ground that even in their opinion a stronger case has been made out by the other party. (*Stryker v. Bergen*, 15 *Wend.* 492.) What I understand to be the rule, and our duty to examine now, in all cases on *certiorari*, is, 1st. As to jurisdiction. If this is possessed: 2d. The court will reverse, if the moving party, upon their own showing, fail legally make out their case. (*Ehel v. Smith*, 3 *Caines*, 187. *Townsend v. Lee*, 3 *John.* 435.) 3d. Where the testimony fails to support the matter charged. (*Dodge v. Coddington*, *Id.* 146.) But, 4th. Where some evidence is given to support the charge, however light, if judgment be given thereon, (*Brown v. Wild*, 12 *John.* 455;) and where there is evidence upon the merits, on both sides, (*Trowbridge v. Baker*, 1 *Cowen*, 251,) the court will not reverse unless the case be one in which the weight of evidence is very greatly preponderating, or is so strikingly so as to create the suspicion of injustice, arising from prejudice or passion. In this case, as we have said, the relators were under no imperative duty to sell the stock in question, although good policy would seem to require a sale. There was no unwillingness on the part of the commissioners to sell, because they did negotiate a contract of sale. There is evidence of an offer to purchase the stock at par, on the 5th August, 1869, and of their refusal so to sell; and there is also evidence that prior to that time the stock had been regarded as not worth fifty per cent upon its par value. There is evidence of their agreement, afterwards, to sell the same stock on certain conditions, one of which was that it should be voted on, for the election of specified individuals for directors of the railroad company; and this condition, beside being an ille-

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gitimate condition, was in effect a sale on time or credit, and not what is understood to be, and as the statute must be construed to mean, a sale for cash. True, there is strong conflicting evidence, and evidence of good faith on the part of the relators, but its weight has been adjudged by the county judge; and if we differed with him in his conclusions, it would not be a sufficient legal reason to reverse his judgment.

I have been most embarrassed by the point raised, that the first hearing of this case, and the dismissal of the proceeding, is a bar to the last one.

I think the cases of *White v. Coatesworth*, (6 N. Y. Rep. 137,) and *Demarest v. Darg*, (32 *id.* 281,) are conclusive to sustain this objection, unless the decision is brought within the case of the *State of Michigan v. Phoenix Bank*, (33 N. Y. Rep. 9, and cases cited,) where it was held that any fraudulent conduct of parties, in obtaining a decision or judgment, the court will take cognizance of, and then determine the case as the ends of justice may require. The return of the county judge in this case, I think, clearly indicates that in his view the relators had put their affidavits in such form as to mislead and deceive him as to their action; and he seems to place his conclusion upon that ground. If this was the basis of action of the county judge, his decision can be sustained; otherwise not. The language of the return is susceptible of this construction, and it seems to me that the facts would authorize such a view. The affidavits of the relators omit the particulars of the terms of the contract they claimed to have made. This it was easy to state. On the trial, the counsel for the applicants called for the production of the contract which the relators had made, on their agreement to sell the stock, and which, by the judge's order, they were required to produce on the hearing, and which they did not produce. In the affidavit of the relators, of the date of 7th June, the only material fact stated in it was, that they had sold the stock at par. This omis-

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sion, while it may have misled the county judge on the first hearing, may, with further explanations, and further evidences of intent on the part of the relators, have satisfied the county judge of bad faith, perhaps fraud. It was held, in the Court of Appeals, in 1865, in an unreported case of the *N. Y. Exchange Co. v. De Wolf*, (31 *N. Y.* 273,) "that whether the means of fraud be oral or in writing, whether executed by the parties with all the solemnities of a deed, under seal, and by due form of acknowledgment, or even by judgment, stamped by the judicial sanction of a court, if a party have been induced to enter into the one, or to execute the other by the fraudulent devices of the party who thus secures the advantage, the law, when invoked, declares the whole transaction a nullity." In *Gallatin v. Erwin*, (*Hopkins*, 54,) Chancellor Sanford said that the most odious of all frauds was a fraud practiced upon a court of law; and he held a judgment of the Supreme Court void for the fraudulent circumstances attending the proceedings in obtaining it. In *Kennedy v. Daley*, (1 *Sch. & Lef.* 355,) Lord Chancellor Redesdale held that a decree obtained by fraud and imposition shall have no effect. See the cases cited in *State of Michigan v. Phœnix Bank*, (33 *N. Y. Rep.* 9,) all to the same effect; and for fraud and imposition, judgments can be reviewed collaterally. I am inclined to the opinion that the return of the county judge is based upon his having been deceived and misled by the fraudulent pretenses of the relators upon the first motion, and that his decision thereon was obtained from him by such fraudulent pretenses. If I am right in this, the former decision was not a bar to this proceeding; and that his final judgment may be reviewed upon the merits. Upon the whole, I am for affirming the order of the county judge, without costs to either party.

Order affirmed.

[THIRD DEPARTMENT, GENERAL TERM, at Elmira, September 6, 1870. *Miller*, P. J., and *Potter* and *Parker*, Justices.]

SLATER vs. WILCOX.

Opinions can only be given by witnesses who are possessed of skill or science, upon the subject on which their opinions are asked.

The degree of skill and science possessed is a question of law, for the court to determine, and which, in the appellate court, can be reviewed.

A liberal rule should be applied in regard to evidence concerning diseases in animals; it being rare that persons can be found who make the treatment of diseases in domestic animals a distinct profession, or attain to great skill or science therein.

The best skill and science that can be expected—all that can be practically admitted, in such cases—is the evidence of persons who have had much experience, and have been for years made acquainted with such diseases, and their treatment. They may give their opinions upon such experience, and on statements of fact upon which their opinions are based, as *some* evidence, to be considered and weighed.

Where, in an action to recover damages for a breach of warranty, in the sale of a cow, a witness, after stating that he had owned cows that had the horn distemper, and had doctored them, was asked “how does the horn distemper affect a cow?” *Held* that although the form of the question might be deemed to call for an opinion, yet that an answer stating the witness’s experience in such cases, being as to a matter of fact, was admissible, not as an opinion, but as a fact.

THIS action arose in a justice’s court. It was for breach of warranty in the sale of a cow, and was tried before the justice, without a jury, and judgment rendered for the defendant. There was an appeal to the county court of Otsego county, the judgment affirmed in the county court, and appeal to this court.

Albert Hardy, for the plaintiff.

Card & Brooks, for the defendant.

By the Court, POTTER, J. The only questions to be examined in this case are the decisions of the justice in admitting, or in excluding, evidence of witnesses on the trial. One issue in the case, and perhaps the only material issue, was, whether or not there was a warranty on the sale of the cow in question. On this issue the evidence was con-

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flicting, and the judgment could not be disturbed, if there was no improper ruling, in the rejection, or in the reception of evidence.

The cow in question was purchased on the 3d of April, was delivered on the 6th, and died on the 20th of the same month, confessedly of the horn distemper; so that another important issue was, even if the cow was warranted, whether she was not sound when sold, on the 3d of April. The characteristics of the horn distemper were important to be proved upon this issue, and witnesses were introduced upon both sides, whose opinions were received, or rejected, by the justice, which rulings form the subject of complaint.

The first objection arises upon the testimony of *Amos F. Waters*, a witness for the plaintiff, who testified as follows: "I live neighbor to the plaintiff; I saw this cow the next morning, after he drove her home; I am a farmer; have taken care of cattle and horses ever since I was a boy; have seen cattle that had the horn distemper; I saw the cow in Slater's stable; she was a sick cow; I put my hands on her horns and found they were cold; her eyes looked bad and her hair looked bad.

Q. In your opinion, what was the difficulty with this cow?

Objection; because the witness had not shown himself competent to give an opinion. Objection sustained.

I am sixty years old; I have taken care of cattle from my boyhood; have owned cows; sometimes ten or twelve; have twenty-seven head of cattle this winter; have been doing business for myself since I was twenty-one.

Q. What, in your opinion, was the difficulty with this cow?

The same objection as to same question above, and objection sustained.

I know what ailed that cow.

Q. What?

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Objection as above, and objection sustained,
I saw her after she' died; her head was all rotten, and her horns were entirely hollow."

It is immaterial to inquire whether or not this ruling was right, as the inquiry was only as to what disease the animal had; a question about which there was no dispute; no injury resulted from the exclusion of his opinion; the facts that he saw, he was permitted to state.

The next objection arises upon the testimony of *Russel Waters*, a witness for the plaintiff, who testified that he saw the cow about five days after the plaintiff had her; "he called me to see her; I saw that she was a sick cow; I have doctored cattle some; have doctored cattle that have had the horn distemper; am acquainted with the disease.

Q. In your opinion, what was the difficulty with this cow?

Objected to, because the witness had not shown himself competent to give an opinion. Objection overruled.

A. She had the horn ail, the worst kind.

Q. In your opinion, could this disease have had its origin in this cow within eight days?

Objected to, as incompetent and improper, and objection overruled.

A. I think not."

Cross-examined: "I am a farmer; I have read some on the subject; have read the 'Horse Farrier's Book;' I don't know what the cause of the horn distemper is; it originates in the horn; I can't tell how many bones there are in a cow's head."

The defendant *Wilcox* was sworn, and testified: "I have had cows that had the horn distemper; I have doctored my cows.

Q. How does the horn distemper affect a cow?

Objection: That witness has not shown himself competent to give an opinion. Objection overruled.

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A. I have had it come in twelve hours; at night give their usual mess, and in the morning they wouldn't give any milk to speak of, and appear very stiff in their joints."

Raymond N. Saxton, called as a witness by the defendant, testified as follows: "I have frequently had occasion to doctor cows for myself and others; have seen some cows with this horn distemper.

Q. Is it a disease that comes upon a cow slowly, or all at once?

Objection: Witness has not shown himself competent to give an opinion. Objection overruled.

A. I have had two cows that had the disease; where I would milk them in the morning and they gave their usual mess, and at night would be dried up, horns cold, and you would see she was sick.

Q. With proper care, is it a dangerous disease?

Objected to as immaterial, and as last above. Objection overruled.

A. I never lost one; they die with it sometimes.

Q. Is it a disease that yields readily to prompt treatment if taken in time?

Objected to as last above, and objection overruled.

A. It does, if taken in time."

Cross-examined: "I have given cows tanzy tea; I know my cows had the horn distemper."

Re-direct: "After we knew they were sick, their horns were hollow in twenty-four hours."

Grant Perry, next called as a witness by defendant, testified as follows: "I saw the cow in question on the day of the sale; I looked her over some, with a view of buying her. She looked like a rugged cow. I thought she looked as rugged as any cow he had in the yard; I examined her bag; I have seen cases of horn distemper; I saw nothing about this cow to indicate that she was diseased; I have seen cows with this disease; I don't know as I am acquainted with the symptoms."

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Q. Is it a disease that comes upon them suddenly?

Objected to, as immaterial, and because witness had not shown himself competent. Objection sustained.

"I have known of cows being suddenly attacked with this disease." The defendant offered to show by the witness, from facts within his knowledge, that the disease is one which attacks a cow suddenly, *so that she will die in a few hours*. The plaintiff asked that the evidence, if taken, be taken subject to the same objections as last above stated, and the witness was allowed to testify: "I have known, from facts within my own knowledge, that this disease sometimes attacks a cow suddenly; I have known cows apparently well, to be very sick within twelve hours."

Cross-examined: "I base the evidence I have given on one severe case I had. I can't tell whether all cows are taken alike; I don't know how long my cow had had the horn distemper."

This includes all the rulings complained of, and each ruling will require a separate examination.

It must be conceded that opinions can be given only, by witnesses who are possessed of skill or science, upon the subject upon which their opinions are asked. The degree of skill and science possessed, is a question of law, for the court to determine, and which can be reviewed in the appellate court. A liberal rule must be applied, in regard to evidence as to diseases in animals, as it is rare that persons are found who make the treatment of diseases in domestic animals a distinct profession, or attain to great skill or science therein. The best skill and science that can be expected—all that can be practically admitted in such cases—will be the evidence of persons who have had much experience, and have been for years made acquainted with such diseases, and with their treatment. They may give their opinions, upon such experience, and on statements of fact upon which their opinions are based, as some evidence to be considered and weighed. The

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evidence of such witnesses may be slight and weak, but is the evidence of some experience and judgment, which may not be entirely excluded. Within this rule, I think the evidence of Russell Waters was admissible for consideration of the court.

The evidence of the defendant Wilcox, I think, may be admitted, not as an opinion, but as a fact. It is possible that the form of the question put to him, and which was objected to, might be deemed to call for an opinion; but the answer being an answer of fact, which seems to be proper evidence, does not constitute an error. No legal error can be alleged, as to that.

The same may be said in relation to the testimony of both the witnesses, Raymond N. Saxton and Grant Perry. The questions propounded would seem to border upon calling for opinions; but the answers were, I think, only such facts as a witness, unskilled and without professional science, with experience in facts relating to disease, might give. The strict line, between evidence to be admitted, and evidence to be excluded, in such cases, is a very nice one. Upon the whole, I do not see sufficient error to authorize a reversal.

The judgment should be affirmed.

[THIRD DEPARTMENT, GENERAL TERM, at Albany, October 4, 1870. *Miller*, P. J., and *Potter* and *Parker*, Justices.]

MARBLE vs. McMINN and others.

Surveys, maps, and field-notes, made by a stranger, without authority or right, cannot be received to alter, contradict or vary a title under a previous deed. And a deed with its description taken from such a survey or map, ought to have authenticity, to make it evidence.

In the absence of evidence showing his identity, or that he was even a surveyor, or the correctness of his survey, the survey and maps of such person are worse evidence, as against the parties in interest, than even mere hearsay.

A party cannot, as against the true owner, be holding premises adversely, if his title does not cover the premises. He is, in such a case, a mere squatter or trespasser.

Although adverse possession is not affected by a bad or defective title; and although a claim under a defective title will be a good adverse possession; yet there must be at least color of title.

Where one is in possession without claim of right, before the date of his deed, such possession will be presumed to be the possession of the true owner.

He can claim to be holding adversely, only after, or at the date of, his deed.

There is nothing in the statute, or common law, that prevents a party claiming title to lands from purchasing in outstanding claims of other persons, to quiet his own title; and the deed, release or quit-claim of the outstanding claim is not void; it will have the effect, at least, to quiet the claim of title of the person executing it.

The taking of such a deed is not an acknowledgment that the grantee has no other title.

THIS was an action brought, in June 1865, by the plaintiff against the defendants, to recover possession of an island situate in the town of Davenport, Delaware county, and State of New York. The plaintiff claimed three acres of land, in his complaint, the same more or less. The defendants, by their answer, 1st. Made a denial; 2d. Alleged that they had acquired the title by adverse possession; 3d. That they held it by virtue of a deed from Philo Andrews and wife to them. By consent, the cause was referred to O. W. Smith, Esq., as sole referee, to hear and determine the action. The cause having been brought to a hearing before said referee, he reported in favor of the defendants. A judgment was entered upon the report, for the defendants, from which the plaintiff has

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brought an appeal, and claims a reversal of the judgment, and a new trial, for errors committed by the referee. All further facts, necessary to be considered, are stated in the opinion.

George Adee, for the plaintiff.

A. Raymond Gibbs, for the defendants.

By the Court, POTTER, J. ' On the trial the plaintiff proved title to the premises in question in one Philemon Harlow, under a lease in perpetuity, with covenants of warranty, from Peter Smith, Wm. Laight and John Jacob Astor, dated September 1st, 1803, which was received in evidence as an ancient deed, describing the premises as follows: "All that farm or piece of land situated and lying in a certain tract known by the name of the Charlotte River Patent, in the county of Delaware, and is more particularly distinguished on a map of said tract, made by Lawrence Vrooman, by being the westerly side or part of lot No. 39, south side of the river, and is bounded northerly by the middle of the river as it winds and turns, westerly by lot No. 40, southerly by the southerly bounds of the patent, and easterly by a line to be drawn through the lot parallel to the westerly line of the same, at such distance therefrom as will make the piece hereby described exact one hundred and twenty acres." This description, as delineated on a diagram produced in evidence, covers the premises claimed in the complaint. This title descended to James Harlow, the son of the lessee above named. James Harlow also claimed to own the premises described in the complaint, parcel of said 120 acres, under a comptroller's deed, which is claimed to be delineated upon another map produced in evidence, and this parcel is described, by witnesses, as an island, lying south of Charlotte river, and between the said river and

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a ditch or slang, as it is called, made by erecting a dam in the main channel of the river, and diverting the water through this canal, ditch or slough, to a saw-mill. The plaintiff then, by various mesne conveyances, traces the title to a certain patent called the Charlotte River Patent, and the Byrnes Patent, to Gerrit Smith—excepting certain lands theretofore sold or conveyed—which Charlotte River Patent includes the premises in question. The plaintiff also produced in evidence a quit-claim deed from Gerrit Smith and wife to James Harlow, describing the property as in the deed above set forth, dated 3d May, 1852, and also a deed from James Harlow and wife to himself, dated October 17th, 1864, of premises described as follows: “All that piece or lot of land lying and being in the town of Davenport, being a part of lot No. 39, south side of Charlotte river, Charlotte River Patent, the westerly division of said lot bounded northerly by the middle of said river, westerly by lot No. 40, on the south by a slang or mill ditch, or small stream close to the foot of the hill or bank, and on the east by lands of Thomas Shellman, being an island containing about three acres of land, the same more or less.” These are the premises described in the complaint. And there was evidence of possession by Philemon Harlow, and of James Harlow, under this title. When the plaintiff rested, he had established a good paper title and possession under it, and on motion by the defendants, the referee correctly refused to nonsuit.

The defendants then proved a deed, dated January 29, 1847, from Gerrit Smith and wife, to Philo Andrews, of above 275 acres of land on the *north* side of the Charlotte river, containing, by James Frost's survey, made in 1830, the above quantity of land. Frost's map was then offered in evidence, which showed the ditch, canal or slang to be the Charlotte river, and which would be the southern boundary of the premises conveyed. The plaintiff's counsel “objected to this map, that it is improper and imma-

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terial, and was made subsequent to Philemon Harlow's lease, from which the plaintiff's grantor derived title; that it cannot be received to alter, contradict or vary said title; and also because made by a stranger, without authority or right." These objections were overruled, and the plaintiff excepted. These objections become greatly important, inasmuch as the defendant claims title, not only, but to identify the premises in his deed under which he claims to hold, through a conveyance from Philo Andrews, by his conveyance dated in 1851. And the referee bases his decision upon the possession of the premises by the defendant, under the deed of Andrews of June 10th, 1851. Now it must be borne in mind that Andrews' deed, that is, the deed to Andrews, does not cover the premises in question, being located north of the Charlotte river. This is so, even by what is called the Frost map, unless this artificial ditch, or slang, can be construed to be the Charlotte river. This would seem to be the theory of the Frost map. This deed, then, with its description taken from such a survey or map, ought to have authenticity, to make it evidence. Who, then, is James Frost? Who proves him even to be a surveyor? Though there is evidence that he did survey, who proves the correctness of his survey? What power has this stranger to change an artificial ditch into a natural river? His acts are worse evidence than even mere hearsay. The whole weight of evidence is, that the river runs where it did fifty years ago, and that this artificial stream was, if not entirely created, at least supplied with water from the natural river, by the construction of a dam therein. Had the grantor in a deed, having at the time the title, bounded lands by an artificial stream, and called it a river, the monument might have been controlling, as against him and his privies in estate; but no stranger, having no interest in lands, can work such a metamorphosis, to the injury of the true owner of title. Neither map nor sur-

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vey, unauthenticated, can be the shadow of evidence against parties in interest. As the defense is built upon this deed, supported by such a map, the referee committed a fatal error in admitting this evidence. The defendant could not, as against the true owner, be holding the premises adversely, claiming under title, if his title does not cover the premises. He is, in such case, a mere squatter or trespasser. True, adverse possession is not affected by bad or defective title. A claim of title under defective title will be a good adverse possession; but there must be at least color of title. So, even possession alone, without title, is good against all the world, except the owner of the true title. As against him it is otherwise. On a trial in such an action, the person establishing a legal title to the premises shall be presumed to have been possessed thereof within the time required by law, and the occupation of such premises by any other person shall be deemed to have been under and in subordination to the legal title; unless it appear that such premises have been held and possessed adversely to such legal title for twenty years before the commencement of such action. (*Code*, § 81.)

The defendant in this case claims that he was in possession, but makes no claim of right of possession of the premises until the date of the deed of Andrews, which was only eighteen years before the commencement of this action. His possession before his deed is to be presumed to be the possession of the true owner. After or at the date of the deed, only, can he claim to be holding adversely. This being short of twenty years, the plaintiff's title is oldest and best; unless by making this artificial stream to be the river, he can make his deed cover the land. The basis upon which this is claimed to be done, is the Frost map. Now, though such a man as Frost may have lived—may have been a surveyor—nay, had he even been present to have proved his identity, his qualifications, and the correctness of his survey and map, or even had he sworn that,

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in his opinion, this artificial slang or ditch was the river, the undoubted, the undisputed evidence that the natural river had maintained its bed and course for fifty years, and was still unchanged, would still, in law, bring the Frost description on the south side of the river. Maps and opinions cannot change such natural monuments. The Andrews deed description is on the *north* side of the river. The referee could only come to his conclusion by adopting what is called the Frost fancy description, and rejecting legal natural boundaries and monuments.

The premises in question, then, as a matter of fact, are not held by the defendants, under the Andrews deed; they are not described in it.

I think the referee is also in error, in holding that the plaintiff's deed, from James Harlow and wife, at the time it was executed and delivered, was and is void, and of no effect; and equally in error in holding that the plaintiff has no right to the possession of the said premises, and no right to maintain this action.

The plaintiff showed title to the premises, independent of the James Harlow deed. And having title, there is nothing in the statute or common law that prevents a party claiming title to lands from purchasing in outstanding claims of other persons to the same title, to quiet his own; and such deed, release, or quit-claim of title, is not void. It has the *effect*, at least, to quiet the claim of title of the person executing it. The taking of such a deed is not an acknowledgment that the grantor has no other title. The statute was enacted for no such purpose as that. The only questions in the case are questions of law; there is no dispute about facts.

The defendants, for the purpose either of showing title out of the plaintiff, or in themselves, put in evidence three deeds: 1st. A deed from Gerrit Smith to one David McMinn, dated November, 1843. They do not in any way connect themselves with this title. The character of

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this deed is not given. The case informs us that the defendants got possession of it from the referee and refused to furnish it, or a copy of it. This, then, is a part of the evidence which it is to be presumed the referee passed upon, and which, by their act, this court cannot review. They cannot, therefore, take any benefit from this evidence. The plaintiff's original title was older than this, if it covers the premises; and even if it could be considered by us, it did not deprive the plaintiff of his older title from the same source. 2d. They introduced the deed under which they claim title, a deed of warranty from Philo Andrews to them, the defendants, dated June 10, 1851. The description is as follows: "All that certain piece or parcel of land situated in Davenport aforesaid, and bounded as follows: north by the Charlotte turnpike road, west by the west line of lot 39, in the Charlotte River Patent, between said turnpike and the south branch of the Charlotte river, on the south by the south stream of said river, easterly by a parallel line with the west line at sufficient distance from the same to contain two acres of land within said bounds."

There is no evidence to show that this description, containing but two acres, covers all, even if it covers any of the premises in dispute. The quantity claimed in the complaint is about three acres, described by monuments, which the maps No. 1 and B, given in evidence, show to contain $5\frac{31}{100}$ acres. The Northern boundary of the land as described in this deed, the Charlotte turnpike road, as shown by the map, is far north of the main body of the Charlotte river. Bounded by this road north, west by the west line of lot 39; south by the south stream of this river, (wherever that may be,) and easterly by a parallel line with the west line, and at sufficient distance from the same to contain two acres, would include but the merest fraction of the disputed premises. Under this deed, even upon the theory of the referee, if the deed conveyed good title, the defendants were holding adversely to only

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a fraction of the disputed land; not to the whole of it. 3d. The defendants introduced in evidence a deed from Philo Andrews to Edwin R. Brown, dated 10th December, 1851. The premises therein are described as follows: "Beginning at the mill floom on the Charlotte river, of James and Daniel McMinn's mill, thence down said mill-race on the east bank to the southwesterly corner of a lot of land owned and occupied by Simon Dibble, thence east on said Dibble's line across the turnpike road to the west line of a lot of land owned by Geo. Beers, thence north on said Beers' line to the most southwesterly corner of said Beers' lot, thence north 16d 30m west, 56c 75l to the east line of lands owned by James and Daniel McMinn, thence southerly on the line of lands owned by said McMinn to the center of the most southerly stream of the Charlotte river, thence up said river to the place of beginning, containing one hundred acres of land, more or less.

The said Philo Andrews always reserving all privileges on said premises which he has formerly conveyed to James and Daniel McMinn, and also reserving the use of said lands during his natural life."

This deed conveys no title to the defendants, nor can it convey away any from the plaintiff. We are furnished no map or other oral evidence to show what property it covers. One boundary in the deed seems to be the southerly stream of the Charlotte river. It may include the disputed premises; but the defendants claim that they had been previously conveyed to them. From the indefiniteness of this description, or rather from want of explanation, we are unable to give any importance to this deed. The burden of showing that this and other deeds introduced by them covered the premises, was upon them. They failed to do this, except by showing that an artificial ditch or slang was a river.

There was evidence in the case, of possession, and claim of possession of these premises, and of the quantities of

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water that ran at different times in the slang, of the overflowing by the river of the whole disputed lands, and of declarations of parties affecting these questions, not necessary to be considered. We propose to consider only the questions of law. The defendants subsequently introduced another deed, containing a long description of lands, from James Harlow to Alanson Harlow, but it is not followed by any evidence showing its materiality, and it calls for no remark.

The defendants, against the plaintiff's objections, put in evidence the field notes of a survey of lot No. 39, by James Frost, and it was received by the referee. These field notes show that Frost adopted the south stream of said river as the boundary, and like field notes and survey of lots 40, which the case informs us were kept by the defendants' attorney; that he refuses to furnish it, or a copy. They also introduced field notes and survey claimed to have been made by one Broadhead in 1804, but the same is without any name of a surveyor, or a date. This the referee also received in evidence, against objection by the plaintiff. This also purports to bound along the southerly stream.

The referee having erroneously received these documents in evidence, the judgment must be reversed, whatever else might be our view of the case. They could not be evidence. No landholder would be safe if strangers could make up surveys and maps, and, without proof of their accuracy, or competence of the maker, they could be used as evidence, to divest him of his estate. The proposition is too absurd to be seriously discussed. The judgment must be reversed, a new trial granted, costs to abide the event, and the reference discharged.

[THIRD DEPARTMENT, GENERAL TERM, at Albany, October 4, 1870. *Miller*, P. J., and *Potter* and *Parker*, Justices.]

STANLEY O. HARRIS *vs.* JOHN M. HOUCK and others, Commissioners of Highways of the Town of Hartwick.

Where the commissioners of highways of two towns make a joint contract with an individual to build a bridge across a stream which is the boundary line between the towns, and after the completion of the bridge the commissioners of one of the towns accept the same, on the part of their town, and pay the contractor its full equitable proportion or half part of the contract price, and the commissioners of the other town, on their part, do acts, by part payment, which amount to a conditional acceptance of the bridge, the latter commissioners are equitably bound to pay all that remains unpaid by them; and an action will lie against them by the contractor, for the amount, without joining the other commissioners as parties defendants.

The act of 1857, providing that whenever any two or more towns shall be liable to make or maintain any bridge or bridges, it shall be lawful for the commissioners of said towns, or of commissioners of either one or more towns, respectively, to enter into joint contracts, and that such contracts may be enforced against such commissioners *jointly or severally*, respectively, (*Laws of 1857, ch. 383, § 2.*) authorizes a several action against the commissioners of any town so contracting, without joining as defendants the commissioners of the other town or towns contracting.

In accepting a bridge constructed under a contract made by the commissioners of several towns jointly, each board acts for itself, severally. The statute nowhere provides for a meeting of the commissioners of two or more towns as a joint board.

THE defendants were, at the commencement of this action, commissioners of highways of the town of Hartwick, Otsego county. In 1869, the plaintiff entered into a contract with the defendants and the commissioners of highways of the town of Otsego, to build a bridge across the Oaks creek, a stream which is the boundary line between the said towns of Otsego and Hartwick, and was to receive therefor \$575. The plaintiff built the bridge, and notified the commissioners of each town that it was finished, or would be finished, by a day he fixed. On that day two of the commissioners of the town of Otsego, and one of the commissioners of Hartwick, met the plaintiff at the bridge, and expressed themselves satisfied with it. The commissioners for Otsego accepted the bridge, as far as they were concerned, and directed the plaintiff to call on either of them for their half of the contract price. The

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commissioner for Hartwick expressed himself satisfied, but said he could not pay for it until he saw the other commissioners. Two or three days afterwards, the commissioners for Otsego paid their half of the contract price in full. The commissioners for Hartwick called another meeting, at the bridge. All the commissioners for Hartwick came, and two of the commissioners of Otsego. The commissioners of Hartwick found fault with two of the piers. The commissioners of Otsego said nothing, did not withdraw their acceptance or demand their money back, but it was finally agreed by the Hartwick commissioners, to pay a part of their half of the money, and then if the plaintiff relaid the upper ends of two piers, they would pay the balance. This was agreed to by the plaintiff, and they, the Hartwick commissioners, paid the plaintiff \$160, and agreed to pay the balance as soon as the plaintiff laid up the piers. The plaintiff went on and laid up the piers, as requested by the said Hartwick commissioners, and brought this action against them for the balance of their share of the contract price of the bridge. After proving the facts as above stated, the defendants moved for a nonsuit, on the ground that the commissioners of highways of the town of Otsego should have been joined as defendants. Which nonsuit was granted, and the plaintiff excepted. And judgment of nonsuit being entered, the plaintiff appealed.

Lynes & Bowen, for the plaintiff.

E. M. Harris, for the defendants.

By the Court, POTTER, J. The plaintiff's complaint sets forth two contracts; one made before the building of the bridge, in writing, with the defendants, jointly with the commissioners of highways of the town of Otsego, and the other with the defendants severally, after the bridge was accepted and one half of the consideration paid by

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the commissioners of highways of Otsego, and a portion of the consideration on the part of the defendants had been advanced. The whole consideration of the joint contract was \$575. The commissioners of Otsego had paid their one equal half, \$287.50, and the commissioners of Hartwick \$160 towards their equal half, when the second contract was made. The defendants then refused to accept the bridge in its then present condition, but agreed with the plaintiff, that if he would relay the tops of two abutments, by battering them back differently, they would pay him the balance coming to him. The plaintiff relaid the said abutments as requested. The plaintiff alleged this, in his complaint, and the defendants did not deny it in their answer. The defendants refused to pay this balance, and this action was brought against them severally. When the plaintiff rested his case, the defendants' counsel moved the court to dismiss the complaint, upon two grounds: "1st. That the plaintiff cannot recover against a part of the joint contractors. That this contract was made by the commissioners of Otsego and Hartwick jointly, as one party, and the plaintiff in this action as the other party, and that the action is brought against the commissioners of Hartwick alone, when they should have been joined with the commissioners of the town of Otsego. 2d. That the evidence does not show that the plaintiff has performed on his part, according to the terms of the contract, and specifications and conditions contained therein, and the evidence does not show that the bridge was built and accepted by anybody who had a legal right to accept it; and that it was not accepted by the joint board of the commissioners of the two towns, nor do they claim to show that it was accepted by a regular meeting of either board."

The learned judge disposed of this second ground by a correct ruling as to that objection, by stating the evidence of the defendants' promise to pay when certain repairs were made, and said a case was made out, so far as that

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point was concerned; but, still, he dismissed the complaint, upon the first objection, that the action should have been brought against the whole of the commissioners, jointly.

In this ruling I think the learned judge erred. I think the plaintiffs had a right to recover, as against both objections. Without reference to the statute, conceding there had been a joint contract with the commissioners of two different towns, we are to look at the condition of things at the time the last arrangement was made between the plaintiff and defendants. Each of these towns, though they each had been legally, jointly liable, to pay the whole liability, yet equitably, each was liable to pay but one half of the amount. The town of Otsego was satisfied with the structure, had accepted the bridge on its part, and had paid to the plaintiff its full *equitable* portion or half part of the contract price. It had also performed every *legal* act it could perform by way of releasing itself from further legal liability. The statute nowhere provides for a meeting of the commissioners of two or more towns as a joint board. In accepting the bridge, each board acts for itself, severally. The defendants, on their part, had done acts, by part payment, which amounted to a conditional acceptance of the bridge. They were equitably bound to pay all that remained to be paid to the plaintiff. As to the payment of this equitable balance, they made a distinct, separate and several contract with the plaintiff, (with which the town of Otsego and its commissioners had nothing to do,) to pay the plaintiff such balance, if he would perform certain additional labor, in a certain manner. Their equitable liability was a good consideration for their promise. It is immaterial, and needless, to inquire whether this labor was, or was not, a part of, or included in, the written joint contract. It was a matter only between the plaintiff and defendants. As to this, they severed from the town of Otsego, and made

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their own contract, and the plaintiff had a clear right to recover. It was admitted by the pleadings, it not being denied, that the defendants had in their hands sufficient money, raised by their town, to pay this expense. The defendants had the power to make this new contract. It required no statute, of any kind, to authorize such an action upon such a contract.

But I think the learned judge erred in holding that a suit must necessarily be brought against the whole of the commissioners of all the towns, jointly. Before these statutes, (1841, amended in 1857, chapters 383 and 639,) no joint action could be sustained, uniting commissioners of different towns. The act of 1841 (§ 2) only authorized the proceeding against them upon their joint contracts to be *jointly* brought. The act of 1857, (ch. 383, § 2,) as an amendment to this provides, that "For the purpose of building and maintaining such bridges, it shall be lawful for the commissioners of said towns, or of commissioners of either one or more towns, respectively, (the other or others refusing to act,) to enter into *joint contracts*; and such contracts may be enforced in law or equity against such commissioners, (or their representative successors,) jointly or severally, respectively."

There is to be a presumption that this change of phraseology was intended for some purpose. This is the natural, the reasonable presumption. The act of 1841 gave a new statute remedy, unknown to the common law, a right to proceed against different and several quasi corporations jointly. It can well be perceived, that while this provision was beneficial to the public interests, yet as between the different towns, serious embarrassments and difficulties might arise. As each town would thus become liable for the whole expense, and perhaps driven to further litigation to compel equitable contribution from the others, it presented an obvious reason for the amendment of 1857. It may have been discovered in practice, as in the case

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before us, that one town jointly liable might desire to pay its equitable proportion, while another town so jointly liable, for some good reason, or from some capricious or obstinate reason, would refuse to allow the other town to relieve itself from liability, and insist upon keeping them still jointly liable; nay, even liable to a proportion of the costs of a litigation. Such costs might thus be imposed upon a willing town, because of the caprice the of litigious unwilling one. How appropriate, then, a provision that these towns, through their highway commissioners, may be proceeded against *jointly or severally, respectively*. This is a remedial statute, and every possible effect must be given to it, in order to carry out the intent of its makers; besides, it must have both a reasonable and an equitable construction. What, then, is the meaning and intent of these words in the amendment of 1857: "And such contracts may be enforced against such commissioners, *jointly or severally, respectively*?" The statute contemplates that several towns, two or more, may thus make a joint contract. There is no difficulty in understanding the meaning of these words themselves. The question argued is as to the persons, or bodies of persons, to whom the words are intended to be applied; that is, do the words *severally respectively*, apply to the several bodies of commissioners, or to the several individual commissioners? They certainly mean something different from jointly; they do authorize a several suit to be brought against somebody. We can hardly glance at the object of this statute, and retain a doubt as to its meaning. The whole spirit of the law is to secure a *town* liability, and not an *individual* liability; and there is no statute that creates a town liability, if only one of its several commissioners should be sued severally. In this view it would be an absurd construction, that a town could be held liable, in a suit against one of its several commissioners. Before these acts, towns were only severally liable for the

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acts of their own commissioners, and not liable for the several act or omission of one. The act of 1841 made such towns *equally* liable, and authorized a joint action. Until 1857, no *several* action was authorized. The action must be brought against the two or more bodies severally. By the latter act, while the contract was joint, a *several* action was authorized *against such commissioners*; that is several against *such commissioners* or boards, as before, must be sued jointly; to wit, several as to the bodies. The word *individual* is nowhere used; and, as I think, is not implied or intended.

This case presents the strongest possible illustration of the necessity and wisdom of the amendment of the statute by the act of 1857. The result is, the nonsuit must be set aside, and a new trial ordered, costs to abide the event.

[THIRD DEPARTMENT, GENERAL TERM, at Albany, October 4, 1870. *Miller*, P. J., and *Potter* and *Parker*, Justices.]

SIMON V. N. HAMILTON, plaintiff in error, *vs.* THE PEOPLE,
defendants in error.

An indictment for a misdemeanor in voting at a general election, after the accused had been convicted of a felony, need not allege that the defendant voted *knowingly, willfully* and *corruptly*; those words not being contained in the statute. It is sufficient if the indictment follows the language of the statute. And if the offense is well set forth without these words, they are surplusage, and need not be proved.

The insertion of those words, in the indictment, does not prejudice the defendant, and is cured by the statute of jeofails. (2 R. S. 728, § 54, *subd.* 4.)

The word "unlawfully," is all that is necessary to characterize the offense, in the indictment. All beyond that is surplusage.

Where the prosecutor offers no proof, on his part, to show that the act charged was willful or corrupt, beyond proving the fact of voting by the defendant, and his conviction, no proof is necessary, on the part of the accused, to show the absence of wilfulness or corruption.

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The defendant, on the trial of such an indictment, for the purpose of rebutting the allegation in the indictment that he voted knowingly, willfully and corruptly, offered to prove that previous to his offering to vote, the Governor, on being applied to for a pardon, had written a letter, to the effect that the defendant would need no pardon for the previous offense, he being a minor; and that upon coming of age he would be entitled to all the rights of a citizen; also that he stated his case to two counselors of the Supreme Court, and was advised by them that rights, including the right of voting, which he had never possessed, could not be taken away from him; that of such rights he was not deprived by the conviction; and that on his coming of age he would be a citizen, and have a perfect right to vote. The names of the counsel were not given, nor did the defendant, in his offer, allege that he believed such advice.

Held that the offer must be deemed equivalent to an offer to prove an ignorance of the law, by the defendant; and that it was not broad enough to meet the case. That it was immaterial, and was correctly overruled, because it did not negative the idea, even, that the defendant *knowingly* and *unlawfully* voted.

Every man is bound to know the law; and ignorance of the law is no defense.

And every person is bound, in law, to know that while standing as a convicted felon, unpardoned, the statute forbids him to vote.

On the trial of an indictment, the accused cannot be allowed to show, in his defense, an absence of *intent* to commit the offense charged, by proving that he acted under the advice of counsel, and others; especially where he does not allege that he believed or relied upon such advice.

The objection that the offense charged in the indictment, viz., that the accused did the act charged *knowingly*, *willfully* and *corruptly*, was not proved, applies only to a class of cases where *guilty knowledge* is a part of the definition of the offense, and is the material fact to be proved.

THE plaintiff in error was indicted, tried and convicted, in the court of sessions of Tioga county, of a misdemeanor, in having voted at the general election of 1868, for electors of president, &c., governor, &c., member of congress and assembly, &c., having been previously convicted of a felony, and sentenced to two years' imprisonment in the state prison, at hard labor, and not having been pardoned, or restored to citizenship. The case is brought to this court upon *certiorari*. The material facts in the case were undisputed. The errors claimed were such as arose on the trial, which sufficiently appear in the opinion.

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M. J. Warner, for the plaintiff in error.

D. O. Hancock, (district attorney,) for the defendants in error.

POTTER, J. The statutes of this State in force at the time of voting by the plaintiff in error, and having application to his case, were the laws of 1847, chapter 240, section 15, as follows: "No person shall be permitted to vote at any election, who, previous thereto, shall have been convicted of bribery, or of any other infamous crime, unless he shall have been pardoned and restored to all the rights of a citizen." There is, in another section of another statute, a provision (1 *R. S.* p. 147, § 13, *Edm. ed.*) that "any person not duly qualified to vote under the laws of this State, who shall knowingly vote, or offer to vote, at any general or special town or charter election in this State, shall be adjudged guilty of a misdemeanor," &c. The first cited statute refers to one specified and particular violation; the last, to violations generally, and includes all other cases. The previous conviction for a felony, the sentence thereon, and the service in state prison of the time of such sentence of the plaintiff in error, and the admission, on the trial, that he had never received a pardon from the governor, for said felony and conviction, were all proved or admitted. It was also proved by himself that he was challenged as to his right to vote; that he then claimed his right to vote; that he stated he had all the papers necessary, and that he was not obliged to show them; and that he then voted. On the defense it was offered to be proved that the plaintiff in error had regularly voted in said town, in another district, ever since he became of age, for the purpose of going to the jury on the question of intent in voting in 1868. This evidence was objected to by the district attorney, the objection sustained, and the then defendant excepted. The prisoner's

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counsel also proposed to prove, by the father of the prisoner, that before his son was discharged from state prison he and the prisoner applied to the governor for a pardon, and that the governor replied to said application, in writing, that on the ground of the prisoner's being a minor at the time of his discharge from prison, a pardon would not be necessary in his case, and that therefore he would be entitled to all the rights of a citizen on his coming of age. This offer, it was claimed, was proper, to obtain evidence to go to the jury to rebut the allegation in the indictment that he voted knowingly, willfully, and corruptly. This evidence was objected to, the objection sustained, and the prisoner's counsel excepted. It was proved that the prisoner was seventeen years old when convicted of the felony, and was nineteen when discharged from prison. The prisoner's counsel also proposed to prove, for the same purpose of showing intent, that the prisoner, not being entirely satisfied with the governor's letter, stated his case to two respectable counsel of the Supreme Court, and was advised by both of them that rights, including the right of voting, which he had never possessed, could not be taken away from him; that of such rights he was not deprived by the conviction; and that on his coming of age he would be a citizen, and have a perfect right to vote. This evidence was also objected to and excluded by the court, and the prisoner's counsel excepted. This presents all the questions discussed on the argument in this court.

It is claimed by the counsel for the plaintiff in error, that it being charged in the indictment that the defendant therein *wilfully, knowingly* and *corruptly* voted, &c., these charges became material, and the people were bound to prove them. There are several answers to this point. 1st. No objection of this kind was made on the trial; it cannot now be raised, even if it would have been good then. 2d. These words were not necessary to be inserted in the indictment; they are not contained in the statute.

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The indictment would have been sufficient to have followed the words of the statute. The offense was well set forth without them, and they were useless surplusage. 3d. It did not prejudice the defendant, and is cured by what is called the statute of jeofails. (2 R. S. 728, § 34, *subd.* 4.) 4th. The presumption of law is, that a man always intends the consequences of his act. (*Van Pelt v. McGraw*, 4 N. Y. Rep. 110. *People v. Orcutt*, 1 Park. Cr. Rep. 252.) The word "unlawfully," was all that was necessary as an allegation in the indictment; all beyond this was surplusage. "No person shall be permitted to vote at any election, who previous thereto shall have been convicted of any infamous crime." * * "If any person so convicted shall vote at any such election, unless he shall have been pardoned and restored to all the rights of a citizen, he shall be deemed guilty of a misdemeanor," &c. This is all the legal description, and all that constitutes the offense. The main, and only real questions in the case, arise under the offers of the prisoner on the trial, to give evidence, *first*, to rebut the allegation in the indictment, that the defendant voted knowingly, willfully and corruptly; and, *second*, to show his intention, in voting, in 1868. The *first* offer was needless, as well as useless. The prosecutor made no proof, on his part, to show the act was willful or corrupt, beyond proving the act itself; and we have already said, these words were not necessary in the indictment; so, as they were not otherwise proved, than by proving the fact of voting, by the defendant, and his conviction, no proof was necessary to show the absence of *willfulness* or of *corruption*. The second offer, which may include all that is really in the first, is, to prove in the manner proposed, that there was no *intent* on the part of the prisoner to commit an offense. The whole case is summed up and concentrated in this proposition.

It is needless to cite authority to general propositions so elementary, and so well established, as that it is the

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intention with which an act is done, that constitutes its criminality, and, that the act and intent must concur to constitute the crime. These are principles, not rules of evidence. The only point in this case is, whether the rules of evidence permit the intent to be proved in the manner, and by the character of evidence, proposed by the defendant in the indictment. One of the rules of criminal evidence is, that every man is presumed to intend the natural and necessary, and even the probable consequences of an act which he *intentionally* performs. And a rule of presumption is, that no man is ignorant of the law, for the violation of which he may not be excused, though he may be excused for having committed an act by reason of his ignorance of facts, which ignorance of facts he may prove, to rebut the presumption of knowledge, and to show an innocent intent. A good illustration of this distinction is found in a case (*McGuire v. State*) reported in 7 *Humphrey*, 54, which was a like case, of indictment for misdemeanor in voting. The court say: "If the party voting know the existence of a state of facts which disqualify him in points of law, (he being held not ignorant of the law,) then he shall be guilty of a misdemeanor." Applying that rule to the case before us, we must hold that the prisoner did know that he had been convicted of a felony; he knew, that not having been pardoned, the statute forbade him to vote. The case further illustrates as follows: "If the voter believes himself to be twenty-one years of age, when he is not, he does not know the existence of the qualifying fact—he may, on the ground of ignorance of the *fact*, be excused." So, too, "if the voter honestly believe, as a fact, that he has resided in the county six months before the election, and it turns out otherwise, he may be excused; but if he actually knew that he had been only four months in the county before the election, yet believed, as a matter of law, that to reside four months was sufficient residence, he shall not be ex-

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cused." So, too, "if a voter believe he was born in the United States, and it turns out, as a fact, that he was born in a foreign country, he may be excused. But if he knows he was foreign born, and has not taken the oath of allegiance to the United States, but has only made his declaration, &c., and thinks the latter, *as matter of law*, entitles him to vote, this will not excuse him, for he voted, *knowing a state of facts to exist*, which in point of law disqualified him." The statute under which the above decision was made, is as follows: "Any person who shall *knowingly* vote at any election, not being at the same time a qualified voter in the county in which he votes, shall be adjudged guilty of a misdemeanor." He was held bound to know the law. In the case before us the disqualification is plainly written upon the statute, and the defendant not only actually knew the law, but the facts also. The word *knowingly* is not in our statute, as it is in the case in Tennessee. By the rule laid down in the above cited case, every person is bound, in law, to know that while standing as a convicted felon, he is disqualified from voting.

This brings us to the point of the offer made on the trial, by the defendant, to prove that the governor had written the father of the defendant a letter to the effect that the defendant would need no pardon, being a minor; that upon coming of age he would be entitled to all the rights of a citizen. The offer was, not to produce such a letter, nor to prove that the defendant believed or relied upon it; nor was the offer made except upon general grounds. It must therefore be regarded as an offer to prove a reason for the defendant to violate the law on account of his ignorance of the law.

We may also mention here, the other offer, of similar import, to prove by the defendant himself, that not being entirely satisfied with the letter of the governor, he consulted two respectable counselors of the Supreme Court of this State, and that he was advised by both of them

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that never having possessed the right of voting, it could not be taken away by his conviction, and that on his coming of age he would have a perfect right to vote. In this offer the names of the respectable counsel are not given, nor does the offer add that the defendant believed such advice. These objections, however, were not made; they must therefore, both alike, be put upon the ground of an offer to prove an ignorance of the law by the defendant. I do not think this offer broad enough to meet the case. If he had proposed to prove that in good faith, and with an honest purpose to ascertain the right, he had made a true statement of his case, and had obtained the advice of counselors of the Supreme Court; that he had received such advice and believed it, and acted upon it; he would have brought himself within the rule laid down in Massachusetts, in *Commonwealth v. Bradford*, (9 Metc. 272.) The offer, as made, was immaterial, and I think correctly overruled. It did not negative the idea, even, that he *knowingly* and unlawfully voted.

The supposed cases put by the counsel for the plaintiff, in error, as cases in point, are cases of mistakes of *fact*, not of *law*, to wit: "If a man indicted for an attempt to commit burglary, and the proof should be, that he was seen unlocking his neighbor's door, would he be prohibited from showing, on the trial, that he thought he was unlocking the door of his own house?" Certainly not; this would be a mistake of fact, of identity. So, too, of the supposed case of a man who had been convicted of felony, but who had received a pardon that was a forgery, and voted, could he be convicted? If he believed the pardon to be genuine, it was a mistake of *fact*, and he might show his innocence; but if he knew of the forgery, then he had no pardon, and the misdemeanor would be aggravated by his voting. This rule, of holding a party responsible for a knowledge of the law, may in many cases seem harsh or oppressive, especially where real ignorance

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exists, and where the act may have been committed under mistaken advice; but the converse of this legal rule, it is believed, would create greater mischief, by opening the door too wide for practical use. Such advice could always be obtained, and the statute be a dead letter.

Bishop, in his treatise on *Criminal Law*, (vol. 1, § 375,) says: "We may safely lay down the doctrine, that in no case can one enter a court of justice to which he has been summoned, in either a civil or criminal proceeding, with the sole and naked defense that when he did the thing complained of, he did not know of the existence of the law which he violated." And Lord Hale, in his *Pleas of the Crown*, (vol. 1, p. 42,) says; "Ignorance of the municipal law of the kingdom, or of the penalties thereby inflicted upon offenders, doth not excuse any that is of the age of discretion, and *compos mentis*, from the penalty of the breach of it; because every person of the age of discretion, and *compos mentis*, is bound to know the law, and presumed so to do." But he says, "in some cases ignorance of the *fact* doth excuse, for such an ignorance, many times, makes the act itself morally involuntary."

In *Rex v. Esop*, (7 Car. & P. 584,) it was said by the court, that ignorance of the law is no defense, yet it is a matter to be considered in mitigation of punishment. In Massachusetts an officer was indicted for taking his just fees, but before they were due; the statute imposed a penalty. The court said: "This honest and meritorious officer, by a misapprehension of his rights, received his lawful fee before the service was performed, but which must necessarily be performed at a future day. If we had authority to interpose, and relieve from the penalty, we should do so; but we are only to administer the law." (7 Pick. 279.)

Broom, in his *Legal Maxims*, (p. 190,) in commenting upon the maxim, "*Ignorantia facti excusat, ignorantia juris non excusat*," says: "Ignorance of a material fact may

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excuse a party from the legal consequences of his conduct; but ignorance of the law, which every man is presumed to know, does not afford excuse."

It would be difficult for the court to lay down a rule applicable to one misdemeanor, or to a class of misdemeanors, in which ignorance of the law would be a defense, that should not extend to all; or to draw a line between the cases where it might be an excuse, and where not. No such distinguishing line has been attempted on the argument; the books furnish none. No one would claim to say this defense could be used as to offenses *mala in se*. What distinction, then, could be found among those that are *mala prohibita*? It would seem absurd for a person indicted for selling intoxicating liquors to be allowed to prove his ignorance of the offense; so for selling lottery tickets, horse racing, for violation of the sabbath, for cruelty to animals, &c. Nor would it be excused, should he prove that even counselors at law had advised him that he might do all these things.

The objection that the plaintiff, being a minor when convicted of the felony, and also when discharged from prison, the statute prescribing the punishment for the subsequent misdemeanor did not apply to his case, does not possess sufficient merit to require discussion.

There are some cases cited from other States, which, from a superficial view, would seem to give weight to the objection that the offense charged in the indictment in this case was not proved; to wit, that the defendant *knowingly, willfully and corruptly* voted, &c. This objection applies, and applies only, to a class of cases where *guilty knowledge* is a part of the definition of the offense, and is the material fact to be proved, as, for instance, the crime of forgery, or the passing of counterfeit bills, notes, &c. The essence of the crime consists "in *knowing* the same to be forged or counterfeited," and, "*with intention* to have the same uttered or passed." So in perjury, the crime consists

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in *willfully and corruptly* swearing false. So in England, a statute that no person shall expose to sale metal buttons marked with the word "gilt," (the same not being really gilt,) *knowing the same not to be gilt, &c.* In these cases the allegation of *guilty knowledge*, and of *willful and corrupt* false swearing, are the material essence of the crime, and should be both alleged and proved. The general rule, however, is that matters which are not material to be alleged, and which do not define the offense, if stated in the indictment, are to be regarded as surplusage, and do not vitiate, and need not be proved. It is claimed that the case of *The Commonwealth v. Bradford*, (9 Metc. 268,) is an authority against the rule we have laid down, "that every man is bound to know the law, and that ignorance of the law is no defense." That was an indictment under a statute, (*Gen. Stat. Mass.* 61, § 28,) which reads as follows: "Whoever, *knowing* that he is not a qualified voter at an election, *willfully* votes for any officer to be then chosen, shall forfeit a sum not exceeding one hundred dollars." The indictment, as was proper, alleged the *knowledge* and the willful voting. *Knowledge* was a fact, and was a part of the statute description of the offense, and proof of it became material. When proved as a fact, the defendant, it was held, had a right on the trial to show, in his defense, "that in good faith, with an honest purpose to ascertain the right, he made a true statement of the facts to a professional man." The court held this would be competent as bearing upon the question of his *knowledge* of his right to vote. That is not in conflict with our rule. But it is in conflict with a case decided in North Carolina, (*State v. Boyette*, 10 Iredell, 336.) The defendant was indicted there, under the provisions of a statute, in the following words: "If any person shall hereafter knowingly and *fraudulently* vote at any election," &c. The statute required six months residence of the voter; the defendant had resided but four months. He offered, on the trial,

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the evidence that a very respectable gentleman had advised him that he had a right to vote on four months' residence. The evidence was excluded. The court held that the maxim that ignorance of the law excused no man, applied, and sustained the ruling. The same rule was held in *State v. Hart*, (6 Jones' N. C. Rep. 389.) The court holding, "the defendant voluntarily gave an illegal vote, and necessarily the unlawful purpose attached, *prima facie*, to the act; that it is neither an excuse or justification for such an act, that other persons thought or believed it to be lawful." And a like doctrine is found in 7 Blackf. Ind. Rep. 607.

We have thus reviewed all the cases bearing on this question, coming under our view, at greater length than the importance of the particular case before us would seem to require; but, so far as I can discover, it is the first case of judicial construction of the statute in question, though it involves questions affecting one of the most important privileges of a citizen, the right of franchise. In this view, its importance seemed to call for its extended examination. The result is, the verdict is right, and the case should be remanded to the court of sessions of Tioga county, to proceed to carry into effect the verdict of the jury.

PARKER, J., concurred in the result.

MILLER, P. J., was inclined for a new trial.

[THIRD DEPARTMENT, GENERAL TERM, at Albany, October 4, 1870. Miller, P. J., and POTTER and PARKER, Justices.]

SMITH vs. SLADE.

In an action to recover the value of a horse, wagon, sleigh and harness sold by the defendant on execution, which property was claimed to be exempt, the plaintiff proved that he was a householder, having a family for which he provided; that he owned no other horse, wagon, sleigh or harness; and that he used the property for cultivating land, carrying goods to market, &c. *Held* that within the rule established in *Wilson v. Hawley*, (81 N. Y. Rep. 658,) the plaintiff had established the facts that he was a householder, and had a family for which he provided, and that he used the property in question as a team, for the support of his family; and that the evidence was sufficient to authorize a judgment in favor of the plaintiff.

And the value of the property being within the limit allowed by law, to wit, \$250; *held* that the same was exempt from sale on execution issued upon a judgment recovered on a note given by the plaintiff and another person, jointly, for the price of a horse purchased by the latter, for himself; it not appearing that such horse was purchased for, or used as, a team, or a part of a team, by any one.

Although the burden of proof is with a party claiming that property levied on was exempt from execution, to show affirmatively that it was necessary for the support of his family, yet it is not required that he should employ the word *necessary*, in his evidence. It is sufficient that he shows facts that prove, or tend to prove, such necessity.

It is not necessary for the plaintiff to show that he had not other articles exempted by statute, of the value of \$250, or which, with the articles mentioned in the complaint, exceeded the sum of \$250.

It is sufficient for the plaintiff, on the trial, to show that the articles levied on, and claimed to be exempt, are enumerated in the statute as exempt property when the same are *necessary*; and then to show them to be necessary, and within the limit as to value. Neither the statute nor the rule of legal evidence calls upon the plaintiff to prove what else he may own.

The exemption in the statute was not made to depend on the pecuniary ability of the debtor.

THIS action was brought to recover the value of a horse, wagon, harness and sleigh, all of the value of \$115, which the defendant caused to be sold on an execution issued upon a judgment in favor of himself, and against the plaintiff and one John E. Smith. The plaintiff claimed the property at the time of the sale as exempt from levy and sale on execution, and forbade the sale on that ground, mentioning each article by name. At the time of the

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sale, the plaintiff was a householder, having a family for which he provided. He owned no horse, sleigh, wagon or harness other than those in question. He used the property for cultivating land, carrying goods to Troy, and for a variety of other purposes.

The judgment upon which said execution was issued was recovered upon a joint note given by one John E. Smith and the plaintiff, for the purchase price of a horse (but not the one in question) purchased of the defendant by John E. Smith for himself.

It was stipulated at the trial that the value of the articles in question should be regarded as \$115. At the close of the testimony the defendant's counsel moved for a nonsuit, upon the ground, among others, that it did not appear that the plaintiff had not other property exempt by law from levy and sale under execution, of the value of \$250. The motion was denied, and the defendant excepted.

Judgment was entered in favor of the plaintiff, and the defendant appealed.

Francis Rising, for the appellant.

E. L. Fursman, for the respondent.

By the Court, POTTER, J. There is no conflict of facts in this case. The questions raised are strictly those of law; they are questions involving the construction of the statutes, and most of them have been judicially passed upon by the courts, whose decisions we are bound to regard and adopt. The statute, the construction of which is most particularly called in question, is the statute of 1842, as amended in 1866. The statute of 1842 was an amendment of the Revised Statutes; adding thereto an exemption to the amount of \$150, of necessary household furniture, and working tools, and team owned by any person being a householder or having a family for which he provides; with a proviso that such exemption should not

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extend to any execution issued on a demand for the purchase money of *such* furniture, tools or team, or articles now enumerated by law. The amendment of 1866, extended this exemption to professional instruments, furniture and library, necessary food for a team for a period not exceeding ninety days, and a sewing machine, and also extended the *value* of such exempted property to \$250. In other respects, the phraseology of the law of exemption has not changed so as to require any change of construction.

The defendant insists that the plaintiff having united in a joint note with one John E. Smith, for the purchase of a horse, though as surety, upon the recovery of a judgment on such note, and execution issued thereon, the plaintiff's team was not exempt, because the note was given *for purchase money* of a team. The answer to this objection is, that it nowhere appears that the horse so purchased, and for which the note was given, was used in a team by any one, or that he was purchased for a team, or a part of a team. On the contrary, John E. Smith, the purchaser, was a single man. The horse sued for was not the same horse so purchased, and the proviso in the statute is confined to the purchase money for *such team*; that is, the team so purchased. And it has been held at general term, in the fifth judicial district, by an able court, that the *surety* in a note given for the purchase of property, is not, within the meaning of the act of 1842, a purchaser. (*Davis v. Peabody*, 10 Barb. 94.) And this principle, though arising under a different statute, is sustained in the Court of Appeals, in *Vilas v. Jones*, (1 N. Y. Rep. 278.) This view of interpreting the statute is according to the most obvious and natural import of its object and intent. There has been some conflict of opinion as to questions arising under this statute, but among the latest of the cases is that of *Wilcox v. Hawley*, in the Court of Appeals, (31 N. Y. Rep. 658,) where most of the questions

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arising in this case have been fully considered. Within the rule in that case, the plaintiff in the case before us, established the facts that he was a householder, and had a family for which he provided, and that he used the property in question, as a team, for the support of his family; and its value was within the limit allowed by law, to wit, \$250, and he claimed the exemption, and forbade the sale, on that ground.

The remaining questions in the case arise on the motion to nonsuit, made by the defendant, on the grounds, 1st. That the plaintiff had not shown that the various articles mentioned in the complaint, and claimed as exempt from execution, were necessary to the plaintiff for the support of his family. 2d. That the plaintiff had not shown that he had not other articles exempted by the statute of 1842, and the acts amendatory thereof, which, with the articles mentioned in his complaint, exceeded the sum of \$250. 3d. That the plaintiff had not shown that he had not other property exempted by said act, of the value of \$250.

1. As to the first objection, I do not think it is well taken. While it is true that the burthen of proof, in such case, is with the party claiming the exemption, to show affirmatively that it is necessary, it is not required that the plaintiff should employ this word, *necessary*, in his evidence; it is sufficient that he show facts that prove, or tend to prove, this necessity to the jury, or to the court. (*Griffin v. Sutherland*, 14 Barb. 459, per Parker, J. *Wilson v. Ellis*, 1 Denio, 462.) There was sufficient evidence in this case, before the justice, to authorize his judgment, in this regard.

2. I think the second objection has no merit in it. It is quite immaterial whether, or not, the plaintiff has not other articles beside those levied on, also exempted by statute, which, with those claimed in the action, exceed \$250. The statute limits the exemption by enumerating

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the articles which, within the value of \$250, are exempt, and if the articles so enumerated exceed that limit of \$250, the debtor may elect which description of property he will have exempted, if this election is made within a reasonable time. (*Seaman v. Luce*, 23 Barb. 242, sustained by *Mason, J.*, *Id.* 252. *Lockwood v. Younglove*, 27 Barb. 506, 508, per *Johnson, J.*)

3. The third objection falls within the rule laid down under the second. It was sufficient for the plaintiff, on the trial, to show that the articles levied on, and claimed to be exempt, are enumerated in the statute as exempt property, when necessary, and then show them to be necessary, and within the limit as to value. Neither the statute, nor the rule of legal evidence, calls upon the plaintiff to prove what else he may own. In *Wheeler v. Cropsey*, (5 How. Pr. 288,) the court, at general term, in the third district, said: "We think the team of every teamster, and of every other man, where it is necessary to his use, is exempt, although the owner may be worth thousands of dollars in money, or in other property." This view was adopted by the Court of Appeals, in *Wilcox v. Hawley*, (31 N. Y. 658.)

The exemption in the statute was not made to depend on the pecuniary ability of the debtor; it is a benign and remedial statute, enacted for the benefit of families, from the highest motives of public policy, and it is the duty of courts to see to it that its humane provisions shall not be defeated by technicalities. Being remedial, its language is always to be so construed as to give effect to the end the legislature had in view in its enactment; and it is the duty of courts, if possible, to prevent a failure of the remedy intended.

If we are right in our review of this case, the judgment should be affirmed.

Judgment affirmed.

[THIRD DEPARTMENT, GENERAL TERM, at Ogdensburgh, November 1, 1870. *Miller, P. J.*, and *Potter and Parker*, Justices.]

BENNETT *vs.* COOPER and others.

A county court must be held at the place appointed by law. In matters requiring notice, the county judge cannot hold an adjourned court at his chambers.

Where a county judge adjourned the court to his chambers, and there heard all the proceedings for the discharge of an insolvent, and granted the discharge; *held* that the same was void.

THIS was an action on a bond given for the jail limits, and was tried at the Greene circuit, November, 1870, without a jury. Isaac M. Cooper, one of the defendants, had been taken on execution against the person, and had given this bond, for the limits. He afterwards went beyond the limits, and the bond was assigned by the sheriff to the plaintiff, who brought this action. The defense was that Cooper was discharged by the county court, prior to the escape. The question was on the validity of the discharge; and the alleged ground of invalidity was, that all the proceedings were had at the office of the county judge, at a so called adjourned county court.

A. C. Griswold, for the plaintiff.

Olney & King, for the defendants.

LEARNED, J. There was a regular term of the county court held in September, 1868. On the 10th of September an entry was made in the minutes, in these words: "Court adjourned to 19th instant, at 10 A. M., at chambers of judge." The first proceedings for the discharge were on the 19th of September, at the county judge's office; and the final proceedings were on the 21st of the same month, at the same place. There was no term of the court until December. It was claimed that on one or two occasions, during these proceedings, the attorney for the plaintiff was present. But he did not formally appear, nor intend

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to appear. If he had appeared in the proceedings, it is possible that, under section 31 of the Code, his appearance would have waived a notice; and that thus the county court might have been considered to be in session at the time when the proceedings were had.

But there was no appearance; and the question remains simply as to the power of the court to adjourn to the judge's chambers and act there as a court, in matters requiring notice.

The same section (31) requires the terms of the court to be held at the places designated by statute.

By the law, as it stood prior to the constitution of 1846, the courts of common pleas, in all cases not specially provided for, were to be held at the court houses in the respective counties. (2 *R. S. marg. p.* 215, § 21, *part 3, ch. 1, title 5.*) The constitution of 1846 substituted county courts for courts of common pleas. (*Art. 6, § 14. Art. 14, § 5.*) The legislature, in the following year, provided that the terms of the county courts should be held at the court house, or other usual place of holding courts of common pleas. (*Sess. Laws 1847, ch. 280, § 26.*)

The distinction in the Supreme Court, between business which can be done at chambers and that which must be done at term, is familiar, and is often recognized in the Code. (*See §§ 27 and 401, subd. 3.*) It is true that this distinction has practically been somewhat obliterated by the last clause of section 24, authorizing the adjournment of a special term to chambers; and by the practice which has grown up under that section, and which has been recognized in the *The People v. Central City Bank*, (53 *Barb.* 412.) But I see no authority to extend that power to the county court. Indeed, section 31 implies that in proceedings of which notice must be given, the court is not always open. Of course I have no doubt that the proceedings in this case were conducted as fairly as they would have been in open court. Of this the high character of the judge is

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ample guaranty. Still I think that the law requires the county court of Greene to be held at the court house; and that there is wisdom in giving that publicity to legal proceedings which they cannot so well have in the office of the judge. To allow the court to be adjourned to the office of the judge, and there continued from time to time, as was done in this case, is practically to repeal section 31 of the Code.

I shall, therefore, hold that the plaintiff is entitled to recover.

[GREENE SPECIAL TERM, November 21, 1870. *Learned, Justice.*]

PHILLIPS vs. THE RENSSELAER AND SARATOGA RAILROAD
COMPANY.

In an action to recover damages for a personal injury occasioned by negligence, if the facts proved establish negligence on the part of the defendant, the court should not order a nonsuit, unless the conduct of the plaintiff was, *per se*, negligence contributing to the injury.

It is the duty of a passenger who intends taking the cars, upon a railroad, to use reasonable diligence in inquiring as to the time and manner of entering and taking his seat therein. But if the railroad company has made no rules and regulations on that subject; or, if made, has given them no publicity by signs, card-boards or other notices, as to a particular station at which they receive and discharge passengers; then the case is left to be settled by the common law duties and obligations of the railroad corporation, and the rights of the passenger who has purchased a ticket and is entitled to be carried therefor, in the cars.

In such a case, the passenger is left to find out, as best he can, as to the side, and place, and time, at which he may enter the cars; and he is justified in relying upon his observation of the custom of the company on prior occasions, as to the time, place and manner of receiving and discharging passengers at the same place, and may assume such to be the rules and regulations of the company, in that respect, and act upon that assumption, provided he acts with such prudence and care as a reasonable man is bound to exercise.

Where there was an absence of any passenger platform, to indicate the proper place for passengers to enter the cars; and though there was a narrow plank

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walk on the east side of the track, it was the custom of the railroad company to receive and discharge passengers on both sides; and the plaintiff himself, on former occasions, had been received and discharged on the east side of the track, as had other passengers, all along, for a distance of over 200 feet; *Held* that the company having permitted, if they had not actually adopted, this method of receiving passengers at the station in question, they must be regarded as responsible for the safety of the regulation. That it amounted to an invitation, at least to those who had been thus received and discharged, to enter the cars upon either side of the track.

Although, ordinarily, the conceded fact that a passenger attempting to get upon a train while it is in motion, is, *per se*, such an act of negligence on his part, as to bar a recovery for injuries sustained, yet this is not an invariable rule. What is common or ordinary neglect, is much more matter of fact than of law. And in such a case, where the negligence of the plaintiff is claimed to have contributed to the injury, all the facts and circumstances constituting negligence, or those that are proper to be considered, should be left to the jury.

Where the plaintiff offered to prove that before the time of the injury sued for, he had got on and off the cars, at that place, when they stopped no more than they did at the time in question; and that he had knowledge that they frequently did not stop, any more than to slow down as they did at this time; *Held* that the judge erred in rejecting the evidence offered, and directing a nonsuit. That he should have submitted the testimony to the jury, upon a proper charge as to the law. MILLER, P. J., dissented.

THIS was a motion by the plaintiff to set aside a nonsuit granted by Justice Hogeboom at the Albany circuit, in 1866, and for a new trial.

The action was brought to recover damages for personal injuries, alleged to have been sustained by the plaintiff on the 25th of April, 1865, at West Troy, in consequence of the negligence of the defendant. The accident occurred on the day of the public funeral of President Lincoln, at Albany.

At the close of the plaintiff's testimony, the defendant asked for a nonsuit, upon the following grounds:

1st. That the testimony shows no negligence on the part of the defendant.

2d. That from the undisputed evidence, the plaintiff was guilty of negligence.

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3d. That the evidence shows that the plaintiff was not free from negligence.

4th. That the evidence fails to show negligence on the part of the defendant, or freedom from negligence on the part of the plaintiff.

5th. That upon the whole case the plaintiff cannot recover.

The court refused to grant this application, but at the conclusion of the testimony the counsel for the defendant renewed his motion for a nonsuit or dismissal of the complaint on the same grounds as before stated, which was resisted by the counsel for the plaintiff, who claimed that the whole case, and especially all the questions of negligence involved in the case, should be submitted to the jury. His honor thereupon granted the motion for a nonsuit, to which the counsel for the plaintiff excepted.

On motion of the plaintiff's counsel, the court ordered that the plaintiff should have sixty days to make a case, with exceptions, and that the same should be heard in the first instance at the general term, with a stay of proceedings in the meantime.

The material facts sufficiently appear in the opinion of the court.

L. Tremain, for the plaintiff.

J. H. Reynolds, for the defendant.

POTTER, J. Two leading features in this case were presented to the judge on the trial, upon the evidence, and upon which he was called to decide as questions of law, viz: 1st. Whether the defendant had been guilty of negligence; if so, then 2d. Whether the plaintiff had been guilty of such negligence on his part as to preclude his right to recover damages. These questions of law still depend upon the evidence in the case, and require exam-

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ination by this court, upon the review. This review is to be made in the light of a well settled doctrine of law, that when there are facts that tend to show negligence, which are controverted questions of fact, the case is one for the jury; unless the act is negligence *per se*, or the weight of evidence is so preponderating that the court would set aside a verdict founded upon it. So, also, to justify a nonsuit, all disputed facts are to be decided in favor of the plaintiff; and all presumptions and inferences which the plaintiff had a right to ask from the jury, are to be conceded to him. (*Cook v. N. Y. Cent. Railroad Co.*, 3 *Keyes*, 476. *Solmes v. Rutgers Fire Ins. Co.*, *Id.* 419. *People v. Roe*, 1 *Hill*, 471, *n. a.* *Foot v. Wiswall*, 14 *John*. 304.)

The case shows that the injury to the plaintiff occurred in April, 1865, (upon the day of the funeral of the deceased President Lincoln at Albany,) at the village of West Troy. A large concourse of people were waiting at that place to be carried to Albany. One train going in that direction, filled with passengers, had passed without stopping, though they slowed a little, and as they passed some one halloed from the cars, that there was to be another train along. There was evidence that when the second train came along, there were one or two hundred people at West Troy, waiting to take the cars. There was a station house on the west side of the track, at which tickets were sold, on that day, but usually no tickets were sold at that station. Passengers were received and discharged at that station, sometimes, by slowing the cars, without stopping, though certain of the trains, two at least, were advertised to stop, and did stop. Passengers were received and discharged upon both sides of the track, east and west, as much on one side as the other. The station house was between Union street on the north, and Genesee street on the south, which streets run easterly and westerly, and are between 200 and 300 feet apart. Passengers, before that time, had been received and discharged at Genesee street, and be-

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tween that and Union street, along the track. On the day in question the waiting passengers were all along the track between Genesee and Union streets; the largest proportion on the west side; some fifty or about, went over on the east side. On the east side of the track there was a freight platform above thirty feet in length, erected by the defendant and used for freight; above three feet in height, made by driving heavy posts into the ground and timbers nailed to them, and plank floor thereon. When constructed it was sixteen inches from the body of the cars that passed, but by carts backing against it, it had been shoved over towards the track, so that on the day in question, its distance from the cars was less than seven inches. The train in question was a very long one, had commenced slowing, and at the time was under slow motion. There was a call from the cars, "West Troy station," before any attempt to get on; the plaintiff and his brother were among the passengers on the east side of the track, the plaintiff having previously bought his ticket, and very soon before the arrival of the cars, having gone over to the east side of the track, thinking there would be a better chance to get on. After the station was called, the plaintiff attempted to get on the cars; people were jumping on all along the train, on both sides of the track. Where the plaintiff attempted to get on, was the fourth or fifth car from the locomotive engine, and was at the distance of two cars' length from the freight platform. The plaintiff did not know that there was any particular place or side from which to get on; in attempting to get on he took hold of the iron handles of the cars and stepped up on the first step. There were two men ahead of him, on the car, so he could not get any further up the steps; the cars were then jerked ahead, and jerked the plaintiff from the steps, but he did not let loose from the handle of the iron rod; he recovered back on the step, but had no more than recovered back, before he was knocked off by this freight

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platform and rolled along between the car and the platform, from which he received the injury for which he brought the action.

The above may be regarded as the facts which, by the rule we have above laid down, (though there is evidence controverting them,) the judge was bound, on a motion to nonsuit, to regard as the facts in the case; because they were testified to by witnesses competent and unimpeached. If these facts establish negligence on the part of the defendant, the judge should not have nonsuited, unless the conduct of the plaintiff was, *per se*, negligence, contributing to the injury. This is the question first to be considered.

1st. As to the negligence of the defendant.

There is, no doubt, a common law duty devolving upon railroad companies to provide safe and reasonable accommodations at their stations, or at the places where they receive and discharge their passengers; and they possess the power to make all reasonable rules and regulations as to the time, place and manner in which passengers shall enter and be discharged from the cars, and such rules and regulations may be made public, or be otherwise made known, by signs, card-boards, or notices posted at their stations, or in their cars, or by the conductors or other agents who have charge of the cars, and I think it is equally the duty of the passenger who intends taking the cars, to make reasonable diligence or inquiry as to the time and manner of entering and taking his seat therein. But if the railroad company shall make no such rules and regulations, or if made, shall give them no publicity, by signs, card-boards, or other notices, as to a particular station at which they receive and discharge passengers, then, I think, the case is left to be settled by the common law duties and obligations of the railroad corporation and the rights of the passenger who has purchased a ticket and is entitled to be carried therefor in their cars. In such case, the passenger is left to find out, as best he can, as to the side, and place,

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and time, at which he may enter the cars, and I think he is justified in relying upon his observation of the custom of the company on prior occasions, as to the time, place and manner of receiving and discharging passengers at the same place, and may assume such to be the rules and regulations of the company in that regard. I think, also, the passenger is justified in presuming, in this case, that the whole space upon either side of the track, at which it has been the custom of the railroad company to receive and discharge passengers at that locality, is not only a proper place to enter the cars, but that he may also assume that such places are according to the rules and regulations of the railroad company and are safe for that purpose, if, in so attempting to enter, he acts with such prudence and care as a reasonable man is bound to exercise.

Applying these rules to the case before us, here was the absence of any published rules and regulations as to these particulars, except in the newspapers. There was the absence of a passenger platform, to indicate the proper place for passengers to enter the cars; and though there was a narrow plank walk on the west side of the track, it was the custom of the company to receive and discharge passengers on both sides; and the plaintiff himself, on former occasions, had been received and discharged on the east side of the track, as had other passengers, all along from Genesee street to Union street, a distance of about two hundred feet in length. It was the defendants who had permitted, if they had not actually adopted, this way of receiving their passengers at this station, and they must be regarded as responsible for the safety of the regulation. It amounted to an invitation, at least to those who had been thus received and discharged, to enter the cars upon either side of the track. At common law, the carrier must use due care not only in conveying his passengers upon the journey, but in all preliminary matters, such as their reception into the cars, and for their accommodation while

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waiting for it. This accommodation while waiting, of course, means for all ordinary occasions. They are liable for any defects or obstacles which, being left by *their negligence* in the path of the passenger on his way to or from the cars, cause an injury to him. (*Warren v. Fitchburgh Railroad Co.*, 8 *Allen*, 227, 231. *Sherman & Redfield on Negligence*, § 275.) A common carrier, by the very nature of his employment, invites the public to enter into his vehicles, and is liable for the negligence of his servants in taking passengers aboard of his vehicle. (*Drew v. Sixth Av. Railroad Co.*, 26 *N. Y. Rep.* 49.) He must allow his passengers a reasonable time in which to get on and off. (*Fairmont v. Stattler*, 54 *Penn. St.* 375.) He is responsible for an injury resulting from the slightest motion of his vehicle during the entrance or exit of a passenger, unless such motion was caused by circumstances over which he had no control, or unless he had no notice of the passenger's movement. (*Nichols v. Sixth Av. Railroad Co.*, 38 *N. Y. Rep.* 131.) And in all such cases, when the facts, or inferences to be drawn from them, are in some degree doubtful, the only proper rule is, to submit the whole matter to the jury, with proper instructions. (*Id.*, per *Miller, J.*) The carrier must also use prudence in starting, and not set off with a sudden jerk which contributes to the injury. (*Lucas v. New Bedford, &c. Railroad Co.*, 6 *Gray*, 64, 67.) These views relate chiefly to the question of negligence of the defendants. Upon the whole view of the circumstances of this case, I concur in the opinion of Justice Hogeboom, in *McGrath v. Hudson River Railroad Co.*, (19 *How. Pr.* 214, &c.,) "that what constitutes negligence is often, perhaps generally, a difficult question to decide. It is determined, for the purposes of a court and jury, by an inference of the mind from the facts of the case; and as minds are differently constituted, the inferences from a given state of facts will not always be the same. The facts may be so clear and decided that the

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inference of negligence is irresistible; but when either the facts or the inference to be drawn from them are in any degree doubtful, the better way is to submit the whole matter to a jury. This is the more necessary in cases of *negligence*, because of the great variety of considerations which enter into that question." Upon this point, therefore, I am of opinion that the order to nonsuit was error.

2. As to negligence of the plaintiff. It is claimed that the conceded fact, that the plaintiff attempted to get on the train while it was in motion, was, *per se*, such an act of negligence on his part as to bar a recovery. Ordinarily, I think this proposition would be sustained, as sound; but it is not, I think, an invariable rule. The contrary has been held. What is common, or ordinary neglect, is much more matter of fact than of law. (*Story on Bail*. § 11.) "Whether a plaintiff has been guilty of negligence, and thereby contributed to the injury he sustained, was a question of fact for the jury." (*Hegan v. Eighth Av. Railroad Co.*, 15 N. Y. Rep. 380, *per Paige, J.*) "There was evidence on both sides." "It by no means follows, that because there is no conflict in the testimony the court is to decide the issue on a question of law." (*Ireland v. Plank R. Co.*, 13 N. Y. 533, *per Johnson, J.*) "What is gross negligence, depends upon the particular circumstances of each case." (*Nolton v. West. Railroad Co.*, 15 N. Y. 449, *per Selden, J.*) Without multiplying cases of this character, which are numerous, it might perhaps be said, that in a case where a railroad company had their published cards or time tables, and their stations at which they sold tickets, and regularly stopped a given time; with all the conveniences of rooms, platforms and other arrangements, from which the passenger, by reasonable inquiry, and from the outward indications, could know the established regulations of the railroad company, as to the times of stopping and starting, he would be entitled to little consideration should he attempt to enter the car while

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the train was moving; and should he sue for an injury so happening, if there is any case of negligence for which a nonsuit should be granted, that would be a case. But if, from motives of extreme economy of expense, a railroad company omits the ordinary conveniences of a ticket station, and safe and convenient arrangements for waiting passengers; and if, to save time, they receive and discharge passengers while the train is in slow motion; they can hardly allege negligence against one whom they have so received and discharged, if he but repeats an act which is only in conformity to their custom; and this case illustrates the soundness of the rule, that negligence in such particulars is a question of fact which belongs to the jury. True, there is evidence that this train of cars actually stopped at this station, and there is also evidence that it was advertised to stop at that time, on that day; but it does not appear that the plaintiff knew that fact. It is also true that two, of the five or six regular trains a day, were advertised, in the newspapers, to stop, and did stop as advertised; but it also appears that the other trains, not advertised to stop, did receive and discharge passengers along the track on either side, by slowing the train for that purpose, without stopping. I am stating the evidence on this point as the court was bound to regard it on a motion for nonsuit, conceding it to have been strongly controverted, only to show the propriety of having it submitted to the jury under a proper charge from the judge.

This point, it must also be conceded, had features in it unfavorable to the plaintiff, as matters of fact. Although he attempted to enter the car at two cars' length distant from the freight platform, yet he knew the cars were in motion at the time, and he could not be sure, in such a crowd and confusion, that he could enter before he might encounter this freight platform; and it might with propriety be urged as a fact to a jury, that having eyes to see,

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and judgment to exercise, it was negligence in him to risk himself in the attempt to get in, with such danger in view. So it would be fair argument to reply that one train had just passed, so full that it would not stop; that a large crowd were waiting, all anxious to get in, on account of its being an extraordinary occasion, to see a pageant which all desired to witness; that the fear of being left, and seeing the rush of the crowd to enter, he was acting with the same degree of care as the whole multitude in that respect. These facts, circumstances and considerations were especially the province of a jury to consider and weigh, and ought not to be discarded from consideration by the judge. The case is peculiar in its features, as well as novel; it does not seem to me to present a case of absolute negligence *per se*, by either party, that should have withdrawn it from the jury. I have not deemed it needful to examine all the points presented upon the argument.

The view I have taken is sustained by the authority of *Sherman & Redfield on Negligence*. In their new work on that subject, they say: "A passenger ought not to be deemed guilty of contributory negligence when he only takes such risk as, *under the circumstances*, a prudent man would take. Thus, if cars passed in the same direction every few minutes, a *prudent* man would allow one to go by, rather than jump on while it was in motion; but if two or three passed in a day, no man in ordinary health and vigor would hesitate to get on the car while moving at a moderate speed, if the driver refused to stop. And where (as is frequently the case) the drivers of horse cars constantly refuse to come to a full stop for a male passenger, a prudent man would know that it would be useless to let any car pass for this reason, since he would fare no better if he waited for hours. Under such circumstances, we are decidedly of opinion that the act of getting on a car, while in such moderate motion that a prudent man

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would not deem the act unsafe, should not be deemed negligent." (Pages 333, 334, § 282.)

If I am right in these views, that all the facts and circumstances constituting negligence, or those that are proper to be considered, should be left to a jury, then I think the learned judge erred, on the trial, in rejecting the evidence offered by the plaintiff. The offer was to prove by the plaintiff, as a witness, that before the time of the accident he had got on and off the cars, at that place, when the cars stopped no more than they did at this time; and that he had knowledge that they frequently did not stop, any more than to slow down as they did this time. This offer was objected to by the defendant, and the judge sustained the objection, and the plaintiff excepted.

Upon the whole, I think the case should have been submitted to the jury upon a proper charge as to the law, and that it was error to nonsuit. A new trial should be granted.

PARKER, J., concurred.

MILLER, P. J., dissented.

New trial granted.

[THIRD DEPARTMENT, GENERAL TERM, at Ogdensburgh, November 1, 1870.
Miller, P. J., and *Potter* and *Parker*, Justices.]

THE PEOPLE, *ex rel.* James G. Averill, *vs.* THE ADIRONDACK COMPANY, and DAVID C. JUDSON and others, Commissioners for the City of Ogdensburgh.

A municipal corporation has no authority, under the act of the legislature of May 18, 1869, (*Laws of 1869, ch. 907,*) to issue its bonds for the purpose of aiding a railroad corporation in constructing a railroad, where such railroad company has no authority, under its articles of association or otherwise, to construct a railroad, or any part of it, in the county in which such municipal corporation is situated.

There must be a corporation capable of receiving the aid, in the manner offered, as well as a corporation to bestow the aid.

The Adirondack Company has no power or authority, under its articles of association, to construct a railroad through the county of St. Lawrence; and although the statutes have given the company the right to obtain such power, upon its compliance with certain specified conditions, yet, until it has availed itself of the privilege so conferred, a city in that county has no right to issue its bonds to aid in the construction of a railroad, by such company, through the county.

An order of a county judge, appointing commissioners under the act of the legislature of 1869, chapter 907, based upon a petition of taxpayers which is conditional, and not absolute, being conditioned that the avails of the bonds to be issued by a city in aid of a railroad company shall be used exclusively in the construction of a railroad within a particular county—a county in which the railroad company has no right to construct a road—is void.

THIS is a *certiorari*, brought to review the action of the county judge of St. Lawrence county, in certain proceedings had, under the provisions of “An act to amend an act entitled ‘an act to authorize the formation of railroad corporations, and to regulate the same,’ passed April 2d, 1850, so as to permit municipal corporations to aid in the construction of railroads,” passed May 18, 1869. (*Laws of 1869, ch. 907.*) The petition, upon which the county judge based his action was as follows:

“To the Hon. Henry L. Knowles, county judge of St. Lawrence county, N. Y.:

The undersigned, tax-payers of the city of Ogdensburgh, New York, respectfully represent that they are a majority

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of the tax-payers within the corporate limits of said city whose names appear upon the last tax list and assessment roll in and for said city as owning or representing a majority of the taxable property in the corporate limits of said corporation; that they desire that such municipal corporation, the city of Ogdensburgh, shall, pursuant to chapter 907 of the laws of the State of New York, passed May 18th, 1869, entitled an act to amend an act entitled "An act to authorize the formation of railroad corporations and to regulate the same," passed April 2d, 1850, "so as to permit municipal corporations to aid in the construction of railroads," create and issue its bonds to the amount of \$200,000, and invest the same or the proceeds thereof in the stock of the "Adirondack Company," a railroad corporation of the State of New York, to aid said railroad corporation in the construction of its railroad from the river St. Lawrence, at the city of Ogdensburgh, to Saratoga Springs, in the county of Saratoga, said aid to be used exclusively in the construction of said railroad within said county of St. Lawrence."

The matter was entitled by the county judge as follows: "In the matter of the petition of the tax-payers of the city of Ogdensburgh (a municipal corporation of the county of St. Lawrence) under and pursuant to chapter 907 of the laws of 1869, that the city of Ogdensburgh create and issue its bonds and invest the same or the proceeds thereof in the stock of the Adirondack Company, a railroad corporation, in aid of the construction of its road from the river St. Lawrence, at said city of Ogdensburgh, to Saratoga Springs, in the county of Saratoga." And the order made was as follows: "By the county judge of the county of St. Lawrence. Whereas, tax-payers of the city of Ogdensburgh, in the county of St. Lawrence, lately, pursuant to the provisions of chapter 907, of the laws of the State of New York, passed in the year 1869, made application to

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the county judge of said county, by petition, duly verified, setting forth as in and by said chapter prescribed, and among other things, that they desired that such municipal corporation, the city of Ogdensburgh, should create and issue its bonds to the amount of \$200,000, and invest the same, or the proceeds thereof, in the stock of the Adirondack Company, a railroad corporation; and whereas such proceedings were thereupon had, pursuant to the provisions of said chapter, that said county judge did adjudge and determine that said petitioners and those other taxpayers of said city who upon said proceeding appeared before him and expressed a desire to join as petitioners in said petition, and did join therein, (not including the corporations whose names were subscribed thereunto,) did represent a majority of the tax-payers of said municipal corporation, as shown by the last preceding tax list or assessment roll, and do represent a majority of the taxable property upon said list or roll, and caused the same to be entered of record.

Now, therefore, I, the said county judge, do, in pursuance of said chapter, order that David C. Judson, John F. Rossell and Ela N. Merriam, freeholders, residents and tax-payers within the corporate limits of said city of Ogdensburgh, be appointed and commissioned to be commissioners, and they are hereby appointed to be commissioners, for the purposes in said chapter named.

Dated Potsdam, St. Lawrence county, July 16th, 1870.

H. L. KNOWLES, St. Law. Co. Judge."

On the hearing before the county judge, the petitioners produced in evidence a duly certified copy of the articles of association of the Adirondack Company, from the office of the Secretary of State.

These were in the usual form, and were dated October 15th, 1863, and contained the following express provisions:

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“*First.* The name of the said company shall be the Adirondack Company.

Second. The said company shall continue one thousand years.

Third. The places from and to which the said railroad shall be constructed, maintained and operated shall be as follows: 1st. From some point in the town of Hadley, in the county of Saratoga, up and along the valley of the upper Hudson to some point in the town of Newcomb, in the county of Essex. 2d. From some point in the line first above mentioned to some point of connection with the Saratoga and Whitehall Railroad, in one of the towns of Moreau, Northumberland, Wilton or Saratoga Springs, to some point of connection with the Rensselaer and Saratoga Railroad in one of the towns of Saratoga, Saratoga Springs, Milton, Ballston, Halfmoon or Waterford, in said county of Saratoga.

Fourth. The total length of said railroad, as near as may be, is one hundred and twenty miles.

Fifth. The names of the counties through or into which said railroad is intended to be made, are Saratoga, Warren, Essex, Hamilton and Washington.

Sixth. The amount of the capital stock of said company is \$5,000,000.

Seventh. The number of shares of which such capital shall consist shall be 50,000, of \$100 each.”

These articles were filed under the provisions of the general railroad act of 1850, and a special act relating to this railroad, passed April 27, 1863. (*Ch.* 236.) By another special act, passed March 31, 1865, (*ch.* 250,) they were authorized to amend their articles of association, so as to enable it, under the general law, to extend its railroad to lake Ontario or river St. Lawrence, and to increase its stock. No evidence of such amendment was produced on the hearing; it was not claimed that any such amendment had been made. All other material facts appear in the opinion.

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B. H. Vary, for the relators.

C. G. Myers, for the defendants.

By the Court, POTTER, J. It is clear, from the petition, from the entitling of the proceeding, and from the return made to the *certiorari* by the county judge, that the whole proceedings in this case were based upon the theory that the Adirondack Company were authorized to construct a railroad *through the county of St. Lawrence*; and that the \$200,000 of bonds to be created and issued, and the investment of the proceeds thereof, was to be in the stock of such railroad corporation. It is equally clear that the said railroad company possessed no power or authority to construct their road, or any part of it, in said county. True, the statutes had given them the right to obtain such power, upon their compliance with the required conditions; and so any other body of organized citizens, under the general authority of statutes, had power to do the same thing, but no one, neither the Adirondack Company, nor any other corporation or association, had as yet, at the time of the proceeding in question, availed themselves of this privilege so allowed by law. Though the city of Ogdensburgh was a municipal corporation of the county of St. Lawrence, and though the Adirondack Company was a railroad company, yet there was no such railroad company in existence as enabled the city of Ogdensburgh to invest the \$200,000 in bonds, so directed to be issued by the petitioners and by the order of the county judge. There was no railroad corporation of the State, authorized to construct a railroad "from the river St. Lawrence at the city of Ogdensburgh to Saratoga Springs, in the county of Saratoga," upon which the avails of the bonds applied for and directed to be issued, could be used in its construction within said county of St. Lawrence. The petitioners limited their request as to the application of the money,

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and the order of the judge limited it accordingly; and that limit was to a nonentity. There must be a corporation capable of receiving the aid in the manner offered, as well as a corporation to bestow the aid. The only railroad company in existence bearing the name of that which was proposed to be aided, was the Adirondack Company, and this was limited in its dimensions and termination, to the counties of Saratoga, Warren, Essex, Hamilton and Washington; neither of which counties touch or adjoin the county of St. Lawrence. Under the order of the county judge, the commissioners appointed had no power to issue the bonds, and the Adirondack Company had no power to make a contract to apply the proceeds of these bonds in the county of St. Lawrence. The whole proceeding is *ultra vires*, on the part of the municipality of the city of Ogdensburgh, as well as on the part of the Adirondack Company. Neither party is in condition now, and perhaps never will be; neither has the present power to carry out the proposed enterprise, and perhaps never will have. It may be that the Adirondack Company will never amend their articles of association, or extend their line into the county of St. Lawrence; and it may be that if extended by an amended charter, its provisions would be such that the tax-payers of the municipality of the city of Ogdensburgh would refuse to give it their aid. Worse, in effect, as to the power to act, between these two parties is this case, than the contract of two infants, which would be only *voidable* at their option, upon their coming of age; in this case the parties to make the contract are not yet begotten, and the proceeding, therefore, is absolutely void for want of parties to make it.

I think the order of the county judge was void, also, in that it was based upon a petition that was conditional and not absolute. (*Butternuts and Oxford Turnpike Co. v. North*, 1 Hill, 518. *Fort Edward and Fort Miller Plank Road Co. v. Payne*, 15 N. Y. Rep. 583. *Troy and Boston Railroad*

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Co. v. Tibbits, 18 *Barb.* 297.) It was conditioned that the avails be used exclusively in the construction of said railroad within said county of St. Lawrence; and in a county in which the railroad company named had no right to construct a road.

I have regarded this as the leading and substantial point in the case; and if we are right in this view, the questions arising as to the practice, and other questions strictly technical, need not be discussed. I have not regarded them as possessing much merit, if jurisdiction was obtained by the county judge. With no disposition to throw obstacles in the way of enterprises that are intended to aid and facilitate the great system of our internal commerce, to add to the progress of civilization, and to increase the prosperity of secluded portions of the State, we are still bound to declare the intent and effect of the statutes intended to promote those objects, and in all cases where the individual property of the citizen is taken, without his consent, to see to it, that a strict construction of the statute, which divests him of his estate, shall be observed. If we are right in our view of the case, the order of the county judge should be reversed, without costs.

Order reversed.

[THIRD DEPARTMENT, GENERAL TERM, at Ogdensburgh, November 1, 1870.
Miller, P. J., and *Potter* and *Parker*, Justices.]

THE PEOPLE, *ex rel.* The New York Inebriate Asylum, *vs.*
WILLIAM R. OSBORN.

The legislature may, in many ways, interfere with the actual administration of the affairs of a corporation without destroying its corporate existence, or impairing the powers of its managers or trustees.

Although, generally, where the property or effects of a corporation are seized or sequestered by virtue of statutes, in the exercise of the visitorial power, the statutes themselves provide some mode of judicial proceeding for the purpose, such a provision is not essential to the validity of the statute. On the contrary, it is a well settled rule that where the legislature has the power to provide redress for either a public or private wrong, the remedy, or mode of redress, is wholly a subject of legislative discretion.

Where the real estate connected with an asylum belonged to the State, upon which property there was a mortgage for \$60,000 about to fall due, and no funds applicable to the payment of it, except the funds in the hands of the treasurer; and the legislature passed an act requiring the commissioners of the land office to examine into the management of the asylum by the superintendent and other officers of the institution, and take such action (if any) to protect the interest and property of the State, in said asylum, as they might deem necessary;

Held, 1. That the facts were sufficient to justify the commissioners in causing the funds of the corporation to be secured and placed in the custody of a person selected by themselves.

2. That the power vested in the commissioners was *quasi* judicial, and wholly discretionary.

3. That such a discretion, except in a case of palpable abuse, was beyond judicial control by the writ of *mandamus*.

4. That the only conceivable limit on the power vested in the commissioners was that their action should be reasonable, and adapted to the object the legislature intended, viz., the protection of the interest and property of the State.

5. That the action of the commissioners, in assuming the control of the funds of the corporation, and of its books, papers and vouchers, and in directing the treasurer to hold them subject to their control and direction, was unobjectionable, and was a good defense to an application for a *mandamus*, commanding such treasurer to pay over the moneys, and to deliver the books and papers, in his possession, to his successor in office.

APPEAL from an order granting a peremptory *mandamus*.

By an act of the legislature of this State, passed April 15th, 1854, (*Laws of 1854, p. 554,*) it was provided that all

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persons who should become stockholders pursuant to the act, should be constituted a body politic and corporate, by the name of "The United States Inebriate Asylum," which should continue for the period of fifty years, subject, however, to amendment, modification and repeal by the legislature, and have power to sue and be sued, and have a common seal. It should have power by its corporate name to purchase, hold and convey real estate in the city of New York, and erect thereon buildings suitable for such asylum, and for manufacturing and mercantile purposes connected with the institution. It should also have power to purchase, hold and convey such personal property necessary for such purposes, and no other. It was also provided that all the affairs and concerns of the said asylum should be conducted by twenty directors, annually elected by the stockholders from their number. The directors, from their number should elect a president and treasurer. The first board of directors were named in said act. It was also provided that at the dissolution of the institution, the asylum and the grounds attached thereto should be ceded to the State of New York, to be used for some benevolent institution.

By an act passed April 23, 1855, (*Laws of 1855, p. 1097,*) the aforesaid act was so amended as to empower the institution, by its corporate name, to lease buildings suitable for such asylum, and such other buildings as the institution might require. And that five of the board of directors should constitute a quorum for the transaction of business.

By an act passed March 27th, 1857, (*Laws of 1857, p. 429,*) the name of the institution was changed to the "New York State Inebriate Asylum," and the number of the board of trustees was increased to forty, and their aforesaid powers in all respects reënacted. A new board of trustees is named by this act, and constituted a commission to locate said asylum. The trustees were required to make an annual report. The act was to continue in

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force for fifty years, subject to amendments and repeal. By an act passed April 15th, 1859, (*Laws of 1859, p. 902,*) the treasurer of each county in the State was required to pay to the treasurer of the asylum, on the first Monday of July in each year, ten per cent of all the moneys received from the board of commissioners of excise. The site of the asylum buildings, located by the trustees on lands situated in Binghamton, Broome county, was, by said act, confirmed. The trustees were required to expend said moneys in completing the asylum buildings, commenced on said land, and such other buildings and improvements as should be required for the comfort and convenience of the patients. A new board of trustees was named by this act. The senate, on recommendation of the governor, was given the power to remove any trustee of said Asylum, for cause to be specified.

By an act passed March 21, 1861, (*Laws of 1861, p. 120,*) the trustees of said institution were authorized to issue bonds to the amount of \$60,000, the payment of which was to be secured by a pledge of all the lands and buildings belonging to the said institution, to be payable in ten years, and signed by the president and treasurer. All of the moneys arising from a sale of the said bonds to be expended in the building of the said asylum. On failure to pay said bonds at maturity, the holder was authorized to foreclose upon the lands of the institution, the same as by virtue of a real estate mortgage. Such bonds were issued, and became a lien on the real estate belonging to the institution.

By an act passed April 25, 1867, (*Laws of 1867, p. 1998,*) it was provided that certain portions of the license money raised in the city and county of New York should be paid to the said asylum, on condition that the said trustees should, within sixty days after the passage of the act, by deed convey to the State all the real estate, buildings and improvements thereon and appurtenances thereto, owned

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by the said asylum in the county of Broome, and the trustees were empowered to make such conveyance. The trustees duly made a conveyance of the said real estate to the State, on the — day of —, 1867, under and in pursuance of this act, thus placing the title to the real estate at once and absolutely in the State.

By section 3 of chapter 704, passed May 6th, 1870, it is provided that, "The commissioners of the land office are hereby required to examine into the management of the inebriate asylum at Binghamton by the superintendent and other officers of that institution, and to take such action (if any) to protect the interest and property of the State in said asylum as they may deem necessary, and report to the next legislature their action thereon."

At the time of the passage of this act the institution was in operation, and William R. Osborn, the defendant, was the treasurer of the said asylum. On the 1st day of June, 1870, Francis T. Newell was duly elected such treasurer, in the place of the said Osborn, and Osborn's term of office expired, at which time the said Osborn had in his hands, as such treasurer, moneys that he had received for such institution, the sum of \$21,416.15. Said moneys were mainly from the excise funds from the different counties. The said Osborn, as such treasurer, also had the custody and possession of the books of account, papers and vouchers, &c., belonging to the asylum. Osborn refused to pay and deliver to the said Newell, his successor in office, the said moneys, books, papers and vouchers, &c. A motion was then made, at a special term, held in Delaware county, for a mandamus to compel him to pay the said moneys and deliver the said books, papers, vouchers, &c., over to his successor. He defended, on the ground that the commissioners of the land office, acting under the act of the legislature last aforesaid, had assumed control thereof, and directed and required him to hold them subject to their control and direction. The question thus

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presented for consideration was, were the commissioners of the land office authorized by the said act to take such control and direction of the said moneys, books, papers, &c., and control them to the exclusion of the trustees and treasurer of the institution.

The court, at special term, was of the opinion that the commissioners had inadvertently exceeded their powers, and that the defendant was not justified in refusing to pay over the funds in his hands to the treasurer, his successor in office. And that neither was he justified in refusing to deliver the books, papers and vouchers, &c., of the institution to his successor in office. An order was therefore granted directing that a mandamus issue directed to the defendant requiring him to pay to Newell, treasurer of said company, the funds in his hands which he received as treasurer of said company, and to deliver over to him the books, papers, vouchers, &c., of the said company.

From this order the defendant appealed to the general term in the third department. It appearing that the judges were disqualified, the court, on its own motion, ordered that the same be sent to the second department, for argument.

Henry R. Mygatt, for the appellant and the commissioners of the land office.

John N. Pomeroy, for the asylum.

By the Court, GILBERT, J. This is an appeal from an order made at a special term, held in and for the county of Delaware, on the 11th day of August last, awarding a peremptory mandamus against the defendant, the former treasurer of the relator, commanding him forthwith to pay over to Francis T. Newell, his successor in office, the moneys in his hands, which he received as such former treasurer, and to deliver over to said Newell the books of

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account and all papers and vouchers belonging to said relator, which he received as such former treasurer.

The appellant retains these effects of the relator pursuant to authority and directions given him by the commissioners of the land office, acting under an act of the legislature passed in 1870. This act is as follows: "The commissioners of the land office are hereby required to examine into the management of the inebriate asylum at Binghamton, by the superintendent and other officers of that institution, and to take such action (if any) to protect the interest and property of the State in said asylum as they may deem necessary, and to report to the next legislature their action thereon." (*Laws of 1870, ch. 704, § 3.*)

It was held by the court below, and conceded on this appeal, that the legislature had the power to pass an act empowering the commissioners of the land office to give to the appellant the authority and directions under which he justifies his acts, of which the relator complains; and such undoubtedly is the rule of law, whether we regard the relator as a private corporation, or as simply an instrumentality provided for the administration of a public charity. But it is urged that the act confers no such power; that it neither repeals nor modifies the statute incorporating the relator, and that therefore the exclusive power vested by such statute in the trustees of the corporation continues. It may be admitted that the act of 1870 did not have the effect to directly repeal or modify the charter of the relator, or any part thereof. It contains no repealing clause, and its provisions are not of a character to work a repeal by implication. But this is by no means decisive of the case.

The legislature may, in many ways, interfere with the actual administration of the affairs of a corporation, without destroying its corporate existence, or impairing the powers of its managers or trustees. Instances of the exercise by the legislature of this kind of visitorial power have

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been numerous. The powers conferred upon the bank commissioners, by the safety fund act, and upon the comptroller, in relation to insurance companies, and upon the comptroller of the currency, by the act of congress relative to the national banks, occur to me as examples of the legislation to which I refer.

Generally, where the property or effects of a corporation are seized or sequestered by virtue of statutes of this kind, the statutes themselves provide some mode of judicial proceeding for the purpose. Such a provision, however, is not essential to the validity of the statute. On the contrary, it is a well settled rule, that where the legislature have the power to provide redress for either a public or private wrong, the remedy or mode of redress is wholly a subject of legislative discretion. The sole question in the case then is, what is the meaning of the act of 1870? We think it is very plain. The commissioners are to do two things: 1st. They are to examine into the management of the asylum by the superintendent and other officers of the institution; and, 2d. If they deem any action necessary to protect the interest and property of the State in such asylum, they are required to take such action. The only conceivable limit on the power vested in the commissioners to act is, that their action shall be reasonable and adapted to the accomplishment of the object the legislature intended, namely, the protection of the interest and property of the State. We are of opinion that in both these respects the action of the commissioners was unobjectionable.

The learned justice, in the court below, held that the commissioners had, if they deemed it necessary, a right to control the funds, but that they must do it through and in the hands of the legally constituted treasurer of the company. We cannot consent to this view. It was competent for the commissioners to select a depository of the funds. If they had selected the treasurer now in office he would,

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pro hac vice, have been the agent of the commissioners, in the same sense that the appellant now is, and in respect to the funds which the commissioners sequestered, he would not have any power or control by virtue of his office as treasurer of the corporation, but only the right to hold the same as a mere custodian under the direction of the commissioners. The commissioners, therefore, having the power to sequester the funds, it is quite immaterial whether they used the former or present treasurer for that purpose.

The papers show that the real estate connected with the asylum belongs to the State; that there is a mortgage for \$60,000 upon it, which falls due May 1, 1871, and that there are no funds applicable to the payment of it, except the funds in the hands of the appellant. These facts are sufficient, certainly, to justify the acts of the commissioners in causing the funds of the corporation to be secured, and placed in the custody of a person selected by themselves; and it may be that a due protection of the State required the detention of the books and papers and vouchers also. We cannot say that it did not. The power vested in the commissioners is *quasi* judicial, and wholly discretionary. Such a discretion, except in a case of palpable abuse, is beyond judicial control by the writ of mandamus. No such abuse has been shown. We think there is nothing in the objection raised, that the act of 1870 violates the constitution. The law took effect upon its passage, and was in no sense dependent upon the action of the commissioners.

The order appealed from must be reversed, with costs.

[SECOND DEPARTMENT, GENERAL TERM, at Brooklyn, December 15, 1870.
J. F. Barnard, P. J., and *Gilbert* and *Pratt*, Justices.]

CRAMER, receiver &c. vs. BLOOD.

In this case, reported *ante p.* 155, at the end of the referee's findings of facts, (p. 162,) the following additional facts, found by him, should have been inserted, but were accidentally omitted. As they are perhaps necessary to a proper understanding of the case, they are here given.

In addition to the facts found by the referee and stated in his report, he also found the following:

1st. That the money advanced by Mrs. Lowd to the defendant, as stated in the referee's report, and for a portion of which judgment has been directed against the defendant, was delivered to the defendant without the knowledge or consent of William A. Lowd, the judgment debtor, at the time, and without any fraud, or intent to defraud, on his part, either his creditors or any one else, at the time the defendant received it.

2d. That after the same was so paid over to the defendant by Mrs. Lowd, and before the recovery of said judgment in favor of Smith against Lowd, the said William A. Lowd and the defendant had a looking over of their accounts, and settled the same between them, so as settle and discharge, as between themselves, all claim of the judgment debtor, Lowd, upon the defendant, for said money, and every part thereof.

3d. That the signing of the Mancius lease by the defendant, as security for Lowd, was done at the request of Lowd, and the payment of \$100 thereon by the defendant was also made on the like request of Lowd, and long before the recovery by Smith of his judgment against Lowd; and such payment, as between the said William A. Lowd and the defendant, operated to pay and discharge, as between themselves, to the amount of \$100, the claim of the said William A. Lowd against the said defendant, for money received by him of Mrs. Lowd.

4th. That the property sold and money advanced by

Cramer v. Blood.

the defendant to the said William A. Lowd, mentioned in the report of the referee, and amounting to \$29.60, was all advanced by the defendant and received by the said Lowd, with the intent and upon the understanding of both, that the same was to apply on the claim of the said Lowd against the defendant, for any money owing by the defendant to the said Lowd, and as between themselves the same did so apply, long before the recovery of the said judgment by Smith against Lowd, mentioned in said report.

INDEX.

A

ACTION.

See AGREEMENT, 1, 4.
 FRAUD, 1.
 HUSBAND AND WIFE, 1.
 JUSTICE OF THE PEACE, 1.
 PARTNERSHIP, 1, 2, 6.
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ADIRONDACK COMPANY.

The Adirondack Company has no power or authority, under its articles of association, to construct a railroad through the county of St. Lawrence; and although the statutes have given the company the right to obtain such power, upon its compliance with certain specified conditions, yet, until it has availed itself of the privilege so conferred, a city in that county has no right to issue its bonds to aid in the construction of a railroad, by such company, through the county. *The People ex rel. Averill v. The Adirondack Company,* 656

See MUNICIPAL CORPORATIONS.

ADMISSIONS.

See CRIMINAL LAW, 14, 15.

ADVERSE POSSESSION.

1. A party cannot, as against the true owner, be holding premises adverse-

ly, if his title does not cover the premises. He is, in such a case, a mere squatter or trespasser. *Marble v. McMinn,* 610

2. Although adverse possession is not affected by a bad or defective title; and although a claim under a defective title will be a good adverse possession; yet there must be at least color of title. *ib*
3. Where one is in possession without claim of right, before the date of his deed, such possession will be presumed to be the possession of the true owner. He can claim to be holding adversely, only after, or at the date of, his deed. *ib*

AGREEMENT.

1. A promise by a justice of the peace, who has by his own negligence and carelessness entered an erroneous judgment upon his docket, in favor of the defendant instead of the plaintiff, that if the plaintiff will make a motion in the county court to set aside the erroneous judgment, or the execution issued thereon, he will pay all the damages growing out of his mistake, in case the execution shall not be set aside, is not against public policy, and an action will lie upon it. *Christopher v. Van Liew,* 17
2. The plaintiff agreed to furnish to the defendants an engine, boilers, &c., to be of the best materials and subject to the approval of the defendants' engineer, and to guaranty

that they should be in perfect running order. The engine, &c., were delivered, and notes given for the price, but on attempting to use the engine, one of the flues collapsed, so as to prevent any further use of it. The plaintiff, on being applied to by the defendants, promised to repair the flues, which he did, by putting in new ones, and the engine, as repaired, was, with the boilers, approved by the engineer, accepted by the defendants, and continued to be used by them. *Held* that the defendants not having notified the plaintiff of their determination not to accept the engine, on discovering the defect, but having permitted him to make alterations, and continued to use the engine, afterwards, this was to be deemed an acceptance of the same, and a waiver of any claim on account of the previous defect. *Cassidy v. Le Fevre*, 813

3. Accordingly *held* that for the delay caused by the substitution of new flues, the defendants were not entitled to recover damages. *ib*

4. The plaintiff's testator, having an outstanding title to a farm, alienable to the defendant or any one else, an agreement of sale was made, between him and the defendant, by which the defendant was to pay, for such farm, \$5000. He then paid thereon \$4000, leaving \$1000 unpaid, which he agreed to pay within a few days. There was no other writing, between the parties, than a deed of the premises, subscribed by the vendor and his wife and acknowledged, which, by the consent of the parties, was left with a third person, as an escrow, to be delivered to the defendant when he should pay the remaining \$1000. *Held*, 1. That the agreement was not void by the statute of frauds because not in writing and signed by the parties. That it was the agreement of the parties, in writing, and subscribed by the party by whom it was made. 2. That an averment of the defendant's agreement or promise to pay the balance of the purchase money was sufficient to sustain an action therefor, without any allegation of the absolute delivery of the deed, or demand of the balance of the consideration, upon such delivery and acceptance. 3. That the delivery

of the deed as an escrow, was, under the circumstances, a sufficient delivery not only to avoid the statute of frauds, but to estop the defendant from availing himself of it as a defense. 4. That the agreement having been performed on the part of the vendor, but not performed on the part of the purchaser, an action at law would lie upon the express promise to pay the consideration, or upon a promise implied in law. *Cogger v. Lansing*, 421

5. The defendant received from the plaintiff's assignors certain shares of stock, and executed an instrument acknowledging the receipt thereof, and further saying, therein, "which stock I am to do the best I can with, and have one half of the proceeds." *Held* 1. That there was not an absolute sale of one half of the stock to the defendant. 2. That the fair and reasonable construction of the agreement was that the defendant was to receive the certificates, and within a reasonable time dispose of said stock upon the most advantageous terms which he could procure, and when that was accomplished, and the proceeds were realized, he was to receive one half thereof, as his compensation. 3. That the sale or other disposition of the stock, by the defendant, was a condition precedent to his acquiring any interest in such stock, or the proceeds thereof; and that the proceeds of the stock did not mean the stock itself. 4. That if the defendant had sold the stock, fairly, at whatever price he could obtain, he would have been entitled to retain one half of the proceeds of the sale; but that having retained the stock for more than ten years, without effecting a sale thereof, he was not entitled to retain one half of such stock as his own, but was bound to account to the plaintiff for said stock, together with the dividends he had received thereon. *Hogeboom, J.*, dissented. *Wight v. Wood*, 471

See COMMISSIONERS OF HIGHWAYS.
PRINCIPAL AND AGENT.

AMENDMENT.

1. Since the Code, the power of amendment given by section 173 is always

exercised liberally ; and although a complaint may be defective, yet if the court can see that there has been no surprise, and the parties have been fairly apprised of the questions sought to be litigated, substantial justice will be best promoted by trying the cause upon the merits, and giving a judgment upon the testimony, and according to the proofs. *Miller v. White*, 504

2. A plaintiff may properly be allowed to amend his complaint, upon the trial, by enlarging his claim for damages. *Johnson v. Brown*, 118
3. That is clearly a matter resting in the discretion of the justice, at the trial, and no exception will lie to the exercise of such discretion. *ib*

ANSWER.

See PROMISSORY NOTES, 10.

APPEAL.

1. Whether respondents in an appeal by an executor and legatee from a decree of the surrogate, admitting a will to probate, will not waive the right to object to the executor's ability to appeal, by their default in not answering, and in allowing an order to be entered that the appeal be heard *ex parte*? *Quære. Pruyn v. Brinkerhoff*, 176
2. An order denying a motion to strike out a pleading as frivolous cannot be reviewed on appeal. *The Joseph Dixon Crucible Co. v. The New York City Steel Works*, 447
3. It is not a substantial right to have it stricken out. On the contrary, it is a matter of discretion with the judge whether it shall be so stricken out or not. *ib*
4. If a judge improperly holds a pleading to be frivolous, the order is appealable, because the party putting in the pleading loses a right to such a pleading; but the reverse is not true. No right is lost, and the party objecting to its sufficiency may have it set aside, on demurrer. *ib*

5. It *seems* an appeal lies to the general term from an order of the special term, in the nature of an interlocutory decree directing a receiver in the action to surrender the property in his possession to another receiver or to a party to the action. *The People v. The Albany and Susquehanna Railroad Co.*, 204

See PRACTICE.

APPRENTICES.

1. The certificate of a justice of the peace as to the death of an infant's father, required by the statute relative to the binding of infants as apprentices (2 R. S. 154, §§ 1, 2,) to be given, before the consent of the mother shall be deemed sufficient, must be made by a justice of the town where the parties reside, and be indorsed upon the indenture itself. *The People ex rel. Barbour v. Gates*, 291
2. Where a certificate was made, not by a justice of the peace of the town where the parties resided, but by a justice of an adjoining town, and instead of being indorsed upon the indenture itself, was indorsed on a separate paper annexed thereto; it was *held* that the statute had not been complied with, and that an indenture executed with the consent of the mother, only, had no binding efficacy, as against the infant. *ib*
3. *Held, also*, that, so far as the infant was concerned, there was no obligation on her part to fulfill the indenture; but that the mother could not take advantage of the defect in the execution thereof. That she, having consented to the binding of the child, and covenanted, by the indenture, that she would not entice the minor, or cause her to be enticed from the service of the person to whom such minor was bound, during the continuance of the indenture, she was estopped from asserting a right to her custody herself. *ib*
4. The minor, under such circumstances, is under no obligation to remain with the person to whom she was attempted to be bound; nor has the latter any right to detain her in custody against her will. The minor,

then, being without a lawful protector, the duty devolves upon the court, in the exercise of its equitable powers, to determine what disposition should be made of her custody. *ib*

5. In the performance of that duty, the interest of the child should be the controlling question; and whenever that is ascertained, judgment should be pronounced, irrespective of all other considerations. *ib*

6. This power is for the benefit of the child, and is not to be defeated by one having a mere legal title to its custody. *ib*

7. The statute relative to "apprentices and servants bound by indenture," is not merely directory, but is peremptory and absolute in its requirements, and must be substantially complied with, or the indenture will be void. *ib*

ASSESSMENTS.

1. Where an ordinance directs an avenue to be curbed and guttered, and sidewalks flagged, without requiring that new flagging shall be used, it is not a ground for setting aside the assessment, that the contractor, under the direction of the street commissioner, finding good flagging on a part of the line, resets it, only charging the expense of the labor. *Matter of Anderson*, 411

2. Neither is it a ground for setting aside the assessment that the lots are charged for the work done opposite each lot, while the expenses are charged on all the property, per foot, equally. That is a matter within the discretion of the assessors, who are to make the assessment according to the amount of benefit each lot receives from the improvement. *ib*

8. Nor is the fact that more than one lot, owned by the same person, is included in one assessment, instead of being separately assessed, any ground for vacating the assessment. *ib*

4. Although it would be better to assess each lot by itself, yet when the same person owns the whole, no in-

jury can be sustained by putting them together. *ib*

ASSIGNMENT.

For benefit of creditors. *See* DEBTOR AND CREDITOR, 11.

ATTACHMENT.

The issuing of an attachment is "the allowance of a provisional remedy," within the meaning of section 139 of the Code of Procedure; and if it be legally issued, all questions subsequent are questions of regularity, and not of jurisdiction. *Gore v. Gundlach*, 18

See SHERIFF, 1, 2, 3.

ATTORNEY.

1. The purchase of the stock of a corporation, by an attorney, is not a violation of the statute prohibiting an attorney from purchasing any bond, thing in action, &c., with the intent and for the purpose of bringing a suit thereon. *Ramsey v. Gould*, 399

2. The purchase of stock is not within the prohibition; it not being one of the securities or evidences of debt mentioned, nor a chose in action, within the meaning of the statute. *ib*

3. The statute is a penal one, and cannot be extended to what is not expressly included in it. *ib*

AWARD.

See INJUNCTION, 3 4.

B

BOND.

1. A bond will not be reformed, by striking out portions alleged to be erroneous, where there is no evidence to show it was not drawn in exact conformity to the agreement previously made between the parties, but

on the contrary, the complaint alleges that the bond was drawn according to such agreement, and it is clear that both obligor and obligee understood that the bond should contain the provisions sought to be stricken out. *Garnar v. Bird*, 277

2. The fact that the obligor employed a lawyer, who gave him bad advice, and thereby deceived him as to his rights and induced him to execute the bond, furnishes no authority to the court to alter the contract of the parties. *ib*

3. The condition of a bond executed by a railroad company, to a city corporation, in consideration of the privilege of laying its tracks upon certain specified streets, was that the company should keep the pavement of such streets in thorough repair within the tracks, and three feet on each side thereof, &c., "under the direction of such competent authority as the common council may designate." In an action for a breach of such bond, *Held*, 1. That it was immaterial whether or not the clause providing for a designation of competent authority was a condition precedent to the obligors' keeping the streets in repair. That it was a condition that could be waived; and if the acts of both parties were such that a waiver would have been inferred, as a matter of law, prior to the alleged breach, it was not competent for the obligors, in an action for the breach, to set up the clause as a defense. 2. That the defendants had waived the clause requiring a designation, by entering upon, using and repairing the streets from the date of the bond to the day of trial; and that the plaintiff had waived it by permitting the defendants so to enter upon, use and repair the streets without making any designation. 3. That in such action the proper measure of damages was, the amount of a judgment recovered against the plaintiff, by an individual, for personal injuries sustained by him in consequence of the neglect of the obligors to keep a street in repair, and which judgment the city had been compelled to pay. 4. That the city corporation having notified the company to defend the suit brought against the city, and the company having failed to do so, the expenses of defending

such suit were also a proper item in the recovery upon the bond. *The City of Brooklyn v. The Brooklyn City Railroad Co.*, 497

See ADIRONDACK COMPANY.
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TOWNS.

BRIDGES.

See COMMISSIONERS OF HIGHWAYS.

BURGLARY.

See CRIMINAL LAW, 1, 2, 3, 4, 5.

C

CARRIERS.

1. Where property committed to carriers, consigned to a point beyond their route, was safely transported by them to the termination of their route, and was there delivered to the keeper of a storehouse or warehouse, who acted as the agent of the carriers and others in receiving and delivering freight, by whom it was, in accordance with the usual custom, delivered to a teamster, to be carried by him the remainder of the distance, to the residence of the consignee; and the property was so carried by the teamster and delivered to the consignee; *Held* that the duty of the carriers terminated, certainly upon the delivery of the goods at the consignee's residence, if not before; and that their liability could not be renewed and resuscitated by a return of the property to the warehouse by the consignee. *Salinger v. Simmons*, 513

2. *Held, also*, that the carriers were not responsible for the loss of the goods because the consignee directed the property to be taken back to the warehouse, and because it was so taken back. That to make them liable for the loss of the goods after their return, notice of such return should at least have been given, and that they were required to be taken back to the consignor. *ib*

3. To render a common carrier or warehouseman liable for the loss of

goods, there must be an acceptance of the goods, and the responsibility does not commence until the delivery is complete. It is not enough that the property is delivered upon the premises, unless the delivery is accompanied by notice to the proper person. *ib*

4. One who is engaged in the performance of a legal duty, or of an act which, although not enjoined by positive law, yet which is meritorious and praiseworthy, or who is in the exercise of a legal right, and who, while so engaged, is injured through the negligence of another, is entitled to recover damages. *Eckert v. The Long Island Railroad Co.*, 555

5. The liability of a carrier of passengers, for negligence, is the same, although the injury resulting to the passenger, therefrom, is occasioned by his own act, where the peril is so great as to justify the act. *Per GILBERT, J.* *ib*

6. This principle applies, also, to persons who are not passengers, but who have been placed in peril by the negligence of others, and are doing their best to extricate themselves from such peril; and to persons who are injured while humanely, and without actual negligence, trying to save other lives placed in peril by the negligence of the carrier. *ib*

CASES COMMENTED ON AND DISTINGUISHED.

1. The case of *Warren v. Leland*, (2 Barb. 613,) distinguished from the present case. *Goodyear v. Vosburgh*, 243

2. The cases of *Bennett v. Judson*, (21 N. Y. Rep. 288,) and *Craig v. Ward*, (86 Barb. 377,) have not established a different rule from that settled in this case, as to a *scienter* in the vendor of property. *Marshall v. Gray*, 414

8. All that it was intended by the court to decide, in *Schell v. The Erie Railway Company*, (51 Barb. 368,) was that an injunction to restrain the prosecution of an action pending in the same court, is irregular. *The Erie Railway Co. v. Ramsey*, 449.

CERTIORARI.

1. The correction of errors in the proceedings and determinations of inferior political jurisdictions is matter of legal, and not of equitable, cognizance. *The People ex rel. Haskin v. The Board of Supervisors of the County of Westchester*, 377

2. There is a wide and radical distinction between bringing the record of the proceedings of an inferior body before the court, for the purpose of having them reviewed and passed upon directly by the courts, and either reversed or affirmed, and bringing an original action, founded on some alleged error in the proceedings of such body, and demanding judgment, not upon errors in the record, but upon the allegations of error, in the complaint. *ib*

8. The office which a relator performs is merely that of instituting a proceeding for and in behalf of the people. *ib*

4. The people themselves being the plaintiffs, in a proceeding by mandamus, it is not of vital importance who is the relator, so long as he does not officiously intermeddle in a matter with which he has no concern. The reason applies, with equal force, to the question as to who is a proper relator in a writ of *certiorari*. *ib*

5. If a tax is erroneous as to an individual, he has his remedy by writ of error or *certiorari*. And if the writ can be used to correct an error where the interest of one individual is injuriously affected, there can be no sound reason why it should not be invoked when the rights of a community are invaded. *ib*

6. The public have the same interest that a public act, like the laying of a tax, shall be properly performed, as they have that a public officer shall do his duty; and if a mandamus can be sued out, on the relation of a tax-payer to compel assessors to levy a tax, the same reasoning will sustain a writ of *certiorari* to correct an erroneous tax. *ib*

7. It is no objection to such a writ that it removes the records of more than one road opened by the legis-

lature, under different laws passed at different times, and by different commissions; that the parties are different, the subjects are different, the errors assigned are different, and the judgment may be different; where there is but one warrant, and one assessment upon which such warrant is based, sought to be reviewed. *ib*

8. Although the relator in a *certiorari* has made more assignments of error than the facts warrant, or some improper parties are made defendants, it is proper for the court to quash or correct such part of the proceedings sought to be reviewed as are illegal, and affirm such as are legal, provided one is independent of the other. *ib*

9. The court will, in the exercise of a sound discretion, review the proceedings to be brought up by the writ, or give judgment quashing the writ, and will consider the case upon its merits if the public interest will be thereby subserved. *ib*

10. On a common law writ of *certiorari*, the inquiry is not limited to the question whether the inferior tribunal had jurisdiction of the subject matter, and its proceedings and judgment were within that jurisdiction; but the court will examine the case upon the whole evidence, to ascertain whether any error has been committed. *ib*

11. On a common law *certiorari*, the court may examine the case upon the merits, as well as upon the question of jurisdiction. *The People ex rel. Wilbur v. Eddy*, 593

12. Where it appears, from the return of a county judge to a writ of *certiorari*, that he was deceived and misled by the fraudulent pretences of the relators, upon a former motion, and that the decision thereon was obtained from him by such fraudulent pretences, such former decision will not be a bar to the second proceeding; and his final judgment may be reviewed upon the merits. *ib*

See Towns.

COMMISSIONERS OF HIGHWAYS.

1. Where the commissioners of highways of two towns make a joint contract with an individual to build a bridge across a stream which is the boundary line between the towns, and after the completion of the bridge the commissioners of one of the towns accept the same, on the part of their town, and pay the contractor its full equitable proportion or half part of the contract price, and the commissioners of the other town, on their part, do acts, by part payment, which amount to a conditional acceptance of the bridge, the latter commissioners are equitably bound to pay all that remains unpaid by them; and an action will lie against them by the contractor, for the amount, without joining the other commissioners as parties defendants. *Harris v. Houck*, 619

2. The act of 1857, providing that whenever any two or more towns shall be liable to make or maintain any bridge or bridges, it shall be lawful for the commissioners of said towns, or of commissioners of either one or more towns, respectively, to enter into joint contracts, and that such contracts may be enforced against such commissioners *jointly or severally*, respectively, (*Laws of 1857, ch. 383, § 2*.) authorizes a several action against the commissioners of any town so contracting, without joining as defendants the commissioners of the other town or towns contracting. *ib*

3. In accepting a bridge constructed under a contract made by the commissioners of several towns jointly, each board acts for itself, severally. The statute nowhere provides for a meeting of the commissioners of two or more towns as a joint board. *ib*

COMMISSIONERS OF TOWNS.

See Towns.

COMPLAINT.

1. It is not admissible to substitute or introduce a new and distinct cause of action by way of supple-

mental complaint. *Buchanan v. Comstock*, 582

2. The matters to be introduced by supplemental complaint must be consistent with, and in aid of, the case made by the original complaint. *ib*
3. Where an action was brought to settle and determine the partnership rights of the plaintiff and one of the defendants, and not to determine anything between such defendant and a co-defendant, under an agreement between them; *Held* that the plaintiff could not by a supplemental complaint change the action in its entire scope and purpose, by bringing in and substituting a new controversy—a new and independent cause of action springing out of a transaction occurring since the commencement of the action, between the defendants, with which the plaintiff had no connection. *ib*
4. It is a good objection to a supplemental complaint, that it proposes to introduce new matter of controversy, which would complicate the action, with no advantage to the parties. *ib*

See AMENDMENT.
CORPORATIONS, 9, 10, 11.

CONDITION.

See INSURANCE, (FIRE,) 5 to 10.

CONFESSIONS.

See CRIMINAL LAW, 14, 15, 16.

CONSTITUTIONAL LAW.

See POWER.

CONVERSION.

The plaintiffs' sheep broke out of the lot where they were grazing, and mingled with the sheep of the defendant, which were being driven along the highway, without any fault on the defendant's part. All he did was to allow them to go along the highway with his flock to

his own premises where they could be conveniently yarded and separated. On arriving at the defendant's premises the plaintiffs' sheep were separated, and turned into the highway and driven towards the place where they mingled with the defendant's flock. *Held* that upon these facts there was nothing to justify the conclusion that the defendant either unlawfully took the sheep in question, or converted them to his own use. *Van Valkenburgh v. Thayer*, 196

CORPORATIONS.

1. Where, in an action against a foreign corporation, the corporation appears, by its attorney, and thus submits itself to the jurisdiction of the court, and by the result of the action of the court such corporation becomes the judgment debtor of the plaintiff in the action, this gives the court power over its property and rights of action within this State, and brings the corporation as much within the jurisdiction of the court as if it were a corporation under the laws of this State. *De Bemer v. Drew*, 438
2. The fact that it is a foreign corporation does not relieve it from the status of being a "judgment debtor," nor from the provisions contained in the 2d and 3d subdivisions of section 224 of the Code, relating to "provisional remedies," which apply, in general terms, to all judgment debtors, when an execution has been returned unsatisfied and the judgment debtor refuses to apply his property in satisfaction of the judgment. *ib*
3. The statute, being general in its terms, embracing all "judgment debtors," it is but a fair and reasonable construction to be given to it as a remedial statute, that it includes all persons. Corporations are not excepted, in terms, and ought not to be in practice. *ib*
4. In an action against stockholders of a corporation, brought by a creditor, to charge them individually with a debt of the corporation, a judgment obtained against the corporation is sufficient evidence of its

indebtedness to charge the defendants, unless shown to have been obtained through collusion or fraud. *Conklin v. Furman*, 484

5. Where, by statute, stockholders are made liable for all the debts of a corporation, to an amount equal to the amount of stock held by them, they are so liable as partners, on the indebtedness, as original debtors, at the moment the contract with the company is completed. *ib*

6. And although the statute contains a prohibition against suing the stockholders, *separately*, until a judgment has been obtained against the company, yet if it gives the right to a creditor to sue one or all of the stockholders *together* with the corporation, and on the recovery of a judgment against the corporation authorizes a judgment against the stockholders also, there is no period of time, after the debt is incurred by the company, when a cause of action does not exist against the stockholders; and if suit is not brought against them within six years, it will be barred by the statute of limitations. *ib*

7. A judgment, free from fraud, recovered against a corporation, is conclusive evidence of the indebtedness of the corporation, in a subsequent action brought against a stockholder, or the trustees of the corporation; and the defendants in the latter action are bound by it, as fully as the corporation itself. *Miller v. White*, 504

8. When the trustees of a corporation are sued, there is no hardship in enforcing the rule. If a judgment against the corporation is unjustly obtained, they are guilty of a grave dereliction of duty if they fail to use the means provided by law to have the judgment reversed or vacated; and if they allow an unjust judgment to remain in force against the corporation whose interests they have undertaken to guard, they cannot complain when it is enforced against them personally. *ib*

9. Where, in such an action, the complaint alleged the recovery of a judgment against the corporation, and that the same was unpaid, in full

force and owing to the plaintiff; *Held* that this was a sufficient statement of the indebtedness of the corporation to the plaintiff, without any averment as to the time when the original indebtedness was contracted, what it was for, or how much it was. *ib*

10. The complaint in such an action need not state that the defendants were trustees of the corporation when the debt was contracted. For an omission to file the annual report required by the statute, the trustees are liable for all the debts of the corporation then existing. *ib*

11. An allegation, in such a complaint, that the defendants failed to file any such report as is by law required to be filed within twenty days of January 1st in each year, is sufficient. *ib*

12. The legislature may, in many ways, interfere with the actual administration of the affairs of a corporation without destroying its corporate existence, or impairing the powers of its managers or trustees. *The People ex rel. The New York Inebriate Asylum v. Osborn*, 668

13. Although, generally, where the property or effects of a corporation are seized or sequestered by virtue of statutes, in the exercise of the visitatorial power, the statutes themselves provide some mode of judicial proceeding for the purpose, such a provision is not essential to the validity of the statute. On the contrary, it is a well settled rule that where the legislature has the power to provide redress for either a public or private wrong, the remedy, or mode of redress, is wholly a subject of legislative discretion. *ib*

COUNTY COURT.

1. A county court must be held at the place appointed by law. In matters requiring notice, the county judge cannot hold an adjourned court at his chambers. *Bennett v. Cooper*, 642

2. Where a county judge adjourned the court to his chambers, and there heard all the proceedings for the discharge of an insolvent, and granted

the discharge; *held* that the same was void. *ib*

COUNTY JUDGE.

See MUNICIPAL CORPORATIONS, 8.

CRIMINAL LAW.

1. Where a person has been guilty of a burglary and a larceny at the same time, he may be indicted for either the burglary or the larceny, separately, and convicted of the offense charged. *The People v. Smith*, 46
2. There is no merger, in such a case, which is available to the accused by way of defense, until there has been a trial and conviction for the greater offense. *ib*
3. Burglary and larceny, charged in the same indictment as having been committed on the same occasion, is a compound offense, and upon the trial the party accused may be convicted of either one, without the other. *ib*
4. If there has been a conviction for the burglary, a plea of *autre fois convict* would be a good answer and defense to a subsequent indictment for the larceny which was committed at the same time and by means of the burglary. It is all the same felony, and the lesser is merged and satisfied in the conviction and punishment of the greater. *ib*
5. So a conviction for the larceny which was committed by means of the burglary will constitute a bar to any subsequent trial and conviction of the defendant for the offense of burglary. *ib*
6. There cannot be two convictions for separate acts, constituting the same felony. If it is all the same felony, one conviction is a bar to any other, for the offense, of whatever degree. *ib*
7. On the trial of an indictment for larceny in stealing "promissory notes," a witness testified, that the bills stolen "were of the currency ordinarily known as greenbacks." *Held* that this proof was some evidence, at least, of their genuineness, and when taken in conjunction with the further fact, to which he testified, that they were of the denomination of one hundred dollar bills of that currency, there was enough evidence, also, of the value, to sustain a conviction. *Ramsen v. The People*, 324
8. Where the judge, on such a trial, charged the jury that good character should not shield the prisoners, if from all the testimony (which of course included that upon the subject of character) the jury believed them to be guilty; that they were to consider all the evidence, and where they had a well reasoned doubt arising out of *all the testimony*, good character should protect the prisoners, and should ensure their acquittal if the jury had "any reasonable doubt arising out of the whole of the testimony;" *Held* that the charge should be all taken together, and so taken, it could not have misled the jury. *ib*
9. In the impanneling of the jury, in a criminal case, one of the jurors was asked "if he had formed an opinion as to the general character of the prisoner?" He replied that he had; that "his general character was bad;" and that "he (the juror) was biased." *Held* that these admissions rendered the juror incompetent. INGRAHAM, P. J., dissented. *Allen v. The People*, 388
10. Whatever objection there may have been, under the English system, to two grand juries sitting in the same county at the same time, the Code has relieved the difficulty. The 20th section directs that the courts of oyer and terminer shall be held twice annually, in every county, and as many more terms as the judges shall appoint. The 23d section provides for extra courts to be appointed by the governor, and the 24th section provides for the adjournment of any court to a future day. The holding of one branch of the court does not prevent the holding of the regular courts as directed by the statute. *Per* INGRAHAM, P. J. *ib*
11. It is not a valid objection to a writ of error to remove a case from a court of sessions, that it does not require a return of the *judgment* below, or a return of the proceedings on the indictment "if *judgment*

- be thereupon given."* *Phillips v. The People*, 358
12. Nor is it a ground of objection to the hearing of the case, in the Supreme Court, upon the writ of error, that there is no return of any record of judgment. *ib*
13. It is sufficient if the writ, in terms, commands that the record and proceedings (which include the judgment, if any be given,) be certified to the Supreme Court, and the answer of the court of sessions sets forth the indictment, the trial, the exceptions, the findings of the jury, and the judgment of the court thereon. *ib*
14. A declaration or admission, if made before the accused is conscious of being charged with, or suspected of, crime, is admissible in evidence under all circumstances, however made or obtained; under oath, or without, upon a judicial proceeding or otherwise. But if made afterwards, the law at once becomes cautious and hesitating. The true inquiry then is, was it voluntary? For, unless it is *entirely* voluntary, it is held to be not admissible. *Per PORTER, J.* *ib*
15. By *voluntary* is meant, proceeding from the spontaneous suggestion of the party's own mind, free from the influence of any extraneous disturbing cause. *ib*
16. Where the accused, while under arrest for stealing a horse, was told by the complainant, and again, in substance, by the officer, that "*the best he (the accused) could do was to own it up; that this would be better for him;*" Held that a confession made under this inducement of advantage, if he confessed, was not a *voluntary* confession. *ib*
17. On the trial of an indictment for stealing a horse, it is not erroneous to admit evidence of the accused taking a wagon, on the same night, from another person. The taking of a wagon to use with the stolen horse, if they were used together, is a corroborating circumstance to the main charge, and can be used as evidence for that purpose; notwithstanding it is proof of another felony, also, not charged in the indictment. *ib*
18. An indictment for a misdemeanor in voting at a general election, after the accused had been convicted of a felony, need not allege that the defendant voted *knowingly, willfully and corruptly*; those words not being contained in the statute. It is sufficient if the indictment follows the language of the statute. And if the offense is well set forth without these words, they are surplusage, and need not be proved. *Hamilton v. The People*, 625.
19. The insertion of those words, in the indictment, does not prejudice the defendant, and is cured by the statute of jeofails. (2 R. S. 728, § 54, *subd.* 4.) *ib*
20. The word "unlawfully," is all that is necessary to characterize the offense, in the indictment. All beyond that is surplusage. *ib*
21. Where the prosecutor offers no proof, on his part, to show that the act charged was willful or corrupt, beyond proving the fact of voting by the defendant, and his conviction, no proof is necessary, on the part of the accused, to show the absence of willfulness or corruption. *ib*
22. The defendant, on the trial of such an indictment, for the purpose of rebutting the allegation in the indictment that he voted knowingly, willfully and corruptly, offered to prove that previous to his offering to vote, the Governor, on being applied to for a pardon, had written a letter, to the effect that the defendant would need no pardon for the previous offense, he being a minor; and that upon coming of age he would be entitled to all the rights of a citizen; also that he stated his case to two counselors of the Supreme Court, and was advised by them that rights, including the right of voting, which he had never possessed, could not be taken away from him; that of such rights he was not deprived by the conviction; and that on his coming of age he would be a citizen, and have a perfect right to vote. The names of the counsel were not given, nor did the defendant, in his offer, allege that he believed such advice.

Held that the offer must be deemed equivalent to an offer to prove an ignorance of the law, by the defendant; and that it was not broad enough to meet the case. That it was immaterial, and was correctly overruled, because it did not negative the idea, even, that the defendant *knowingly* and *unlawfully* voted. *ib*

23. Every man is bound to know the law; and ignorance of the law is no defense. And every person is bound, in law, to know that while standing as a convicted felon, unpardoned, the statute forbids him to vote. *ib*

24. On the trial of an indictment, the accused cannot be allowed to show, in his defense, an absence of *intent* to commit the offense charged, by proving that he acted under the advice of counsel, and others; especially where he does not allege that he believed or relied upon such advice. *ib*

25. The objection that the offense charged in the indictment, viz., that the accused did the act charged *knowingly, willfully* and *corruptly*, was not proved, applies only to a class of cases where *guilty knowledge* is a part of the definition of the offense, and is the material fact to be proved. *ib*

D

DAMAGES.

See AGREEMENT, 8.
AMENDMENT, 2.
BOND, 8.

DEBTOR AND CREDITOR.

1. *Rights and remedies of creditors; frauds upon.*

1. Although one may have intended to defraud the creditors of another by taking and converting his property into cash, such intention will be rendered harmless by his delivering the proceeds of the sale to the debtor, or his wife who is his authorized agent. *Cramer v. Blood*, 155

2. And if he subsequently receives a portion of such proceeds, with like intent, from the debtor's agent, for

the use of the debtor and his wife, and to be handed over to them, or for their use, as they may want, such intent will be rendered harmless by his paying over the money to creditors, or to the debtor, or his wife, by his directions. *ib*

8. A settlement between such person and the debtor, and payment of the amount due for such property, or its proceeds, will discharge the former from any liability to creditors of the owner who subsequently obtain judgments against the latter. *ib*

4. A creditor at large of another is not in a situation to question the *bona fides* of a transfer of the debtor's property, or the right of a third person to take such property, or his right to retain the proceeds of its sale. *ib*

5. The statute in relation to conveyances of a debtor's property with the intent to delay, hinder and defraud his creditors, has no application to a fraudulent transfer of such property by any one except the debtor; and no one can avail himself of the statute except a creditor who is hindered, delayed or defrauded thereby. A creditor at large cannot be hindered by such transfer, within the purview of the statute. *ib*

6. Where the cause of action set out in the complaint was that the defendant had in his possession either the property of the plaintiff's judgment debtor, or its proceeds, for which he had never accounted, and the referee found that before the plaintiff's judgment was rendered, the defendant had fully accounted with the debtor for all the property, and proceeds of property in his possession; *Held* that the referee should have granted a nonsuit. *ib*

7. As a general rule, remedies upon the primary debt and upon the collateral security may be prosecuted at the same time, even to judgment and execution, though only one satisfaction can be obtained. *The Corn Exchange Ins. Co. v. Babcock*, 231

8. If an attempt be made to collect the judgment both upon the original and the collateral security, that can always be prevented, or remedied, by the order of the court. *ib*

9. There is no legal objection to pursuing remedies upon the primary and the collateral security simultaneously. Nor is it an effectual bar to the obtaining of a judgment upon the original demand, that the suit upon the collateral has been first put in judgment, and that one of the defendants in that judgment is the sole defendant in the action upon the original claim. *ib*

10. The true test is, has satisfaction been had? If so, all other proceedings will be stayed; if not, they will be allowed to be continued. *ib*

2. *Assignments for benefit of creditors.*

11. Where debtors, immediately before making an assignment for the benefit of creditors, bought merchandise which they did not intend to pay for, but which they sold on credit, and assigned the debt owing for the price to the assignee; and at the time of making the assignment retained a large amount of money from the assignee, for their own use; and allowed moneys to be retained by clerks, fraudulently, either for their own use or for the benefit of the assignors; *Held* that these facts, unexplained by the debtors, were amply sufficient to warrant a finding that the assignors were actuated by a fraudulent intent in making the assignment; and that in the absence of any proof explaining the presumption of fraud arising from such acts, it was the duty of the court below to have so found. *The Waverly National Bank v. Halsey*, 249

DECEIT.

See FRAUD, 1.

DECLARATIONS.

See CRIMINAL LAW, 14, 15, 16.
EVIDENCE, 8.

DEED.

1. An objection to a deed that it is not stamped as required by the act of congress, is unavailing, unless the party objecting proves that the omission of stamps was with intent to

evade the statute. The proof lies with him. *Caggar v. Lansing*, 421

2. The effect of a deed delivered as an escrow as a conveyance, and its effect as being the written evidence of a contract between the parties to avoid the statute of frauds, should not be confounded. The questions are not identical. *Per* POTTER, J. *ib*

3. There is nothing in the statute, or common law, that prevents a party claiming title to lands from purchasing in outstanding claims of other persons, to quiet his own title; and the deed, release or quit-claim of the outstanding claim is not void; it will have the effect, at least, to quiet the claim of title of the person executing it. *Marble v. McMinn*, 610

4. The taking of such a deed is not an acknowledgment that the grantee has no other title. *ib*

See AGREEMENT, 4.
EVIDENCE, 7.
REAL ESTATE.

DESCENT.

On the 26th of October, 1848, B. M. died intestate, seised in fee of certain premises, leaving no widow or descendants him surviving, but leaving a sister, M. C., and a grand-nephew, A. M. W. his only heirs at law. M. C. and A. M. W. inherited the lands, as tenants in common, in fee, and afterwards made an amicable partition, by which the premises fell to the share of A. M. W., and a release of the same was made to him, by M. C., dated May 15, 1849. A. M. W. died November 22, 1849, seised in fee of his portion of said lands, intestate, unmarried and without descendants, and leaving no father, but leaving a mother, M. H. who, after the death of her first husband, the father of A. M. W., and during the lifetime of A. M. W., had married a second husband, G. H., by whom she had children, brothers and sisters of the half blood to A. M. W., but not of the blood of B. M. the ancestor of A. M. W., and who were living at his death. *Held*, 1. That A. M. W. and M. C., being tenants in common, each was seised

solely or severally of his undivided share of the land; and all there was of unity between them was of possession, not of estate, in the land. 2. That such possession they could sever and divide, and assign to each his separate part by parol; and the releases which they executed effected nothing more. Neither acquired any new estate. 3. That upon the death of A. M. W., intestate, unmarried, without descendants, leaving no father, the fee descended to his mother, M. H., and to the exclusion of the brothers and sisters of the half blood of A. M. W., they not being of the blood of B. M., the ancestor of A. M. W. *Conkling v. Brown*, 265

DIVORCE.

A decree of divorce obtained in another State upon a personal service of process upon the defendant in this State, is valid and effectual, so far as the plaintiff is concerned. *Holmes v. Holmes*, 805

E

EQUITY.

1. It is a universal rule with a court of equity never to permit injustice to be done, or a wrong to go unredeemed upon mere technical objections, if the court has jurisdiction of the subject matter and of the parties; especially if such injustice lies in the way of the enforcement by the court of its own judgment. *De Bemer v. Drew*, 438
2. When a court of equity obtains jurisdiction of an action for any purpose for which it is authorized to give judgment, it holds such jurisdiction for every other purpose; especially for the purpose of giving effect to its judgment. *ib*
8. Courts do not relieve from acts done under a false impression as to the facts, though under a mistake of the law. The parties must be left to other remedies founded on fraud, if it existed; or, if relief can be granted in any case for mistake of the law, founded on the fact that the

adverse party had parted with nothing of any real value. *Garnar v. Bird*, 277

See INJUNCTION, 1, 2.

JURISDICTION.

PRINCIPAL AND AGENT, 1.

REFORMING INSTRUMENTS.

SPECIFIC PERFORMANCE.

ESTOPPEL.

1. Where a party gets nothing by the contract sought to be enforced against him—neither title nor possession of property—he is not estopped from setting up his defense. *Saxton v. Dodge*, 84
2. An estoppel cannot be predicated upon a *nudum pactum*. *ib*
8. If the whole arrangement for the sale and purchase of a patent is *nudum pactum*, a stipulation that the purchasers shall not dispute the vendor's right and title, and will not set up any defense against the validity of the patent, in any action against them to enforce their promises, is as void as any other part, and cannot estop. *ib*
4. To a suit brought for the partition of a lot, several persons who owned the rear part thereof were all made parties. In the decree in that suit the description of the property ordered to be sold did not include the rear of the lot. All the parties having any title to the lot gave releases, except F. On the sale the whole lot was sold, and F. was paid, and gave a receipt for, her share of the proceeds, but executed no release. She, knowing of the sale, made no objection thereto. *Held* that her acts, in not objecting to the sale, and afterwards receiving payment for her share, *estopped* her, and her representatives, from claiming any interest in the land; and that the sale of the lot under the decree in the partition suit, was to be considered as conveying a good title to the whole lot, although it was not correctly described in such decree. *Garnar v. Bird*, 277
5. Although a mistake as to the law forms no ground for reforming a contract, yet where a party acting

under a mistake of law or of fact, does acts which mislead the adverse party, he is estopped, as well as if he was not acting under such mistake. *ib*

EVIDENCE.

1. On the trial in the county court, of an action on a contract for the sale and purchase of wood, evidence was given to show that both the defendant and his witness stated the contract differently, then, from what they had previously stated it on the trial of the cause before the justice; the difference in the two statements being quite material upon the merits of the controversy, to wit, the quantity of wood to be paid for by the defendant. *Held* that the evidence was properly admitted, it being, as to the defendant himself, in the nature of admissions or declarations by a party, and principal evidence against him, upon the issue; and also competent as impeaching evidence against him or his witness. *McAndrews v. Santee*, 198

2. The rule excluding the testimony of the wife, as to her husband's declarations to her during the existence of the marriage relation has no application to words spoken at the very time of forming the marriage. *Van Tuyl v. Van Tuyl*, 235

3. The declarations of the husband, made in promiscuous conversations having no reference to his relations with his wife, or to the *status* of her or her children, are inadmissible as evidence. *ib*

4. Where the plaintiff and defendant, who are both men of fair character, and stand alike unimpeached, and are of equal credibility, being examined as witnesses, contradict each other directly upon a question of fact, and their testimony is totally irreconcilable, in the absence of other testimony, the case will stand evenly balanced, and the complaint will be dismissed. *Loose v. Morey*, 561

5. But if the plaintiff is fully and circumstantially corroborated in his statement of the facts, by the written agreement of which a specific

performance is sought, duly executed in form, and perfect in all its parts, even to the cancellation of the stamp, and by the testimony of the subscribing witness thereto; so that if the evidence of both parties should be stricken out, or disregarded, as equally balanced, the plaintiff's case would still stand well proved; this will justify a decree in favor of the plaintiff, if the facts thus proved be sufficient to warrant the relief asked for. *ib*

6. Surveys, maps, and field-notes, made by a stranger, without authority or right, cannot be received to alter, contradict or vary a title under a previous deed. *Marble v. McMinn*, 610

7. And a deed with its description taken from such a survey or map, ought to have authenticity, to make it evidence. *ib*

8. In the absence of evidence showing his identity, or that he was even a surveyor, or the correctness of his survey, the survey and maps of such person are worse evidence, as against the parties in interest, than even mere hearsay. *ib*

See CRIMINAL LAW, 14, 17, 21, 22.
EXECUTION, 1, 3, 4, 5.
JUDGMENT, 4.
RAILROAD COMPANIES, 17.

EXCEPTIONS.

See PRACTICE, 3, 5.

EXECUTION.

1. In an action to recover the value of a horse, wagon, sleigh and harness sold by the defendant on execution, which property was claimed to be exempt, the plaintiff proved that he was a householder, having a family for which he provided; that he owned no other horse, wagon, sleigh or harness; and that he used the property for cultivating land, carrying goods to market, &c. *Held* that within the rule established in *Wilcox v. Hawley*, (81 N. Y. Rep. 658,) the plaintiff had established the facts that he was a householder, and had a family for which he provided, and that he used the property in question

as a team, for the support of his family; and that the evidence was sufficient to authorize a judgment in favor of the plaintiff. *Smith v. Slade*, 637

2. And the value of the property being within the limit allowed by law, to wit, \$250; *held* that the same was exempt from sale on execution issued upon a judgment recovered on a note given by the plaintiff and another person, jointly, for the price of a horse purchased by the latter, for himself; it not appearing that such horse was purchased for, or used as, a team, or a part of a team, by any one. *ib*

3. Although the burden of proof is with a party claiming that property levied on was exempt from execution, to show affirmatively that it was necessary for the support of his family, yet it is not required that he should employ the word *necessary*, in his evidence. It is sufficient that he shows facts that prove, or tend to prove, such necessity. *ib*

4. It is not necessary for the plaintiff to show that he had not other articles exempted by statute, of the value of \$250, or which, with the articles mentioned in the complaint, exceeded the sum of \$250. *ib*

5. It is sufficient for the plaintiff, on the trial, to show that the articles levied on, and claimed to be exempt, are enumerated in the statute as exempt property when the same are *necessary*; and then to show them to be necessary, and within the limit as to value. Neither the statute nor the rule of legal evidence calls upon the plaintiff to prove what else he may own. *ib*

6. The exemption in the statute was not made to depend on the pecuniary ability of the debtor. *ib*

EXECUTORS AND ADMINISTRATORS.

1. To render the executors of a deceased partner liable as partners, with the surviving partner, in respect to the business carried on after the death of their testator, it is necessary to show that they voluntarily employed the testator's assets which

had come to them, in the trade. *Richter v. Poppenhusen*, 309

2. It is not sufficient that the business is carried on by the surviving partner with their assent and encouragement; it being his right and duty to do so without either. *ib*

3. Nor do executors incur any responsibility by allowing the share of the capital of their testator to remain in, and be employed in, the business of the partnership, after his death, for the benefit of the *cestuis que trust*, when it is done in accordance with the testator's instructions, contained in his will, or with the partnership agreement; but the assets so directed to be employed are liable to make good the debts contracted during their employment. *ib*

4. To this extent the estate of a deceased partner will, in equity, be applicable to the liquidation of the demands of those who have become creditors of the partnership after his decease. But the executors cannot be made liable personally without entering into the partnership. *ib*

See APPEAL.
WILL, 1.

EXEMPTION.

See EXECUTION.

F

FIELD-NOTES.

See EVIDENCE, 6.

FOREIGN CORPORATIONS.

1. Where a foreign corporation had never filed in the office of the Secretary of State any designation of a person upon whom papers could be served, and there was evidence of its insolvency or refusal to pay its judgment debts; and it had discontinued its organization and the exercise of its franchises; had neglected to hold meetings of its officers; had sold out to another company its

property, and its officers had become officers in the new company, its president becoming the president of the new company, and having the avails of the sale of the property of such corporation in his possession; *Held* that these facts, alone, would justify the appointment of a receiver, even *ex parte*. *DeBemer v. Drew*, 488

2. Where a foreign corporation, sued in this court, appears by attorney, a notice of the appointment of a receiver of such corporation, served upon the attorney, is good service. *ib*

See CORPORATIONS, 1, 2.
JURISDICTION, 2.

FORMER SUIT OR PROCEEDING.

Where it appears, from the return of a county judge to a writ of *certiorari*, that he was deceived and misled by the fraudulent pretences of the relators, upon a former motion, and that the decision thereon was obtained from him by such fraudulent pretences, such former decision will not be a bar to the second proceeding; and his final judgment may be reviewed upon the merits. *The People ex rel. Wilbur v. Eddy*, 598

See JUDGMENT.

FRAUD.

1. An action for fraud and deceit on the sale of a horse, by means of false and fraudulent representations, made with knowledge of their falsity and with intent to deceive, cannot be maintained without proof of a *scienter*. *Marshall v. Gray*, 414
2. When a person, on a sale or exchange of property, *warrants* it, in any particular, he is accountable to the extent of the warranty, whether he knew the fact or not; but where the claim is for *fraud*, the representations must not only be false, but false to the knowledge of the party making them. *ib*
3. The cases of *Bennett v. Judson*, (21 N. Y. Rep. 238,) and *Craig v. Ward*, (86 Barb. 877,) have not established a different rule from the above. *ib*

4. Cases may arise in which a sale, by an insolvent debtor, of all his property, upon credit, may not be fraudulent. But, as a general proposition, such a sale, to a purchaser cognizant of the vendor's insolvency, is fraudulent; the necessary effect of it being to hinder and delay creditors. *Clark v. Wise*, 416

See DEBTOR AND CREDITOR, 1, 2, 5.
HUSBAND AND WIFE, 2.
PARTNERSHIP, 6.
PRINCIPAL AND AGENT, 6.

FRAUDS, STATUTE OF.

See DEED, 2.
VENDOR AND PURCHASER, 2

FRAUDULENT CONVEYANCES.

See DEBTOR AND CREDITOR, 5.

G

GIFTS.

See PRINCIPAL AND AGENT.

GRAND JURY.

See CRIMINAL LAW, 10.

GOVERNMENT BONDS.

See HUSBAND AND WIFE, 2.

GUARDIAN AND WARD.

1. Although the statute authorizes a guardian to keep up and sustain the houses, grounds and other appurtenances to the lands of his ward, by and with the issues and profits thereof, or with any other moneys of the ward in his hands, this does not include the right of rebuilding. *Copley v. O'Neil*, 299
2. Permission to erect, on the ward's land, a building, with the right of removal, can only be obtained from the guardian; and such permission

cannot be given by him as guardian,
to himself as an individual. *ib*

8. A guardian having, as such, charge of his ward's land, his possession of it is in his capacity of guardian, and not otherwise. He cannot, by a contract with himself, create the relation of landlord and tenant, so as to render his occupation that of a tenant at will. *ib*

H

HIGHWAYS.

See COMMISSIONERS OF HIGHWAYS.

HUSBAND AND WIFE.

1. At common law an action lay against husband and wife jointly, for a libel written and published by the wife, alone; and a general judgment could be rendered against them both, if the charge were established. This rule has not been changed, by statute, in this State. *Tait v. Culbertson*, 9
2. Where government bonds, deposited with the defendants, by the plaintiff, with express instructions not to deliver them to any person except upon his written order, were subsequently obtained from them, by the plaintiff's wife, fraudulently, by means of a forged order purporting to be signed by him; *Held* that the plaintiff, being legally responsible for the fraud of his wife, he could not recover from the defendants the value of the bonds. *Kowing v. Manley*, 479
8. The rule of the common law, on this subject, is not changed, or affected, by the legislation in this State giving to married women the control of their property. While the recent statutes relieve them from many of the disabilities formerly resulting from the marital relation, they do not discharge the husband from the liabilities which that relation imposed on him for the torts of his wife. *ib*

See MARRIAGE.

MARRIED WOMEN.

WITNESS, 1.

I

IGNORANCE OF THE LAW.

See CRIMINAL LAW, 22, 23

ILLEGAL VOTING.

See CRIMINAL LAW, 18 to 25.

INFANTS.

See APPRENTICES.

INJUNCTION.

1. To enable a plaintiff to maintain an action against the officers of a county and enjoin the collection of a tax, he must bring his case within some one of the acknowledged heads of equity jurisdiction, viz: (1.) Where the proceedings of the subordinate tribunal will necessarily lead to a multiplicity of actions; (2.) Where they lead, in their execution, to the commission of irreparable injury to the freehold; (3.) Where the claim of the adverse party to the land bought at the tax sale is valid upon the face of the instrument, or the proceedings sought to be set aside, and extrinsic facts are necessary to be proven to establish invalidity or illegality; (4.) Where the tax is upon land, and the law allows it to be sold to collect the tax, and the conveyance to be executed would be conclusive evidence of title; (5.) Where the plaintiff has sustained special injury. *Hanlon v. The Board of Supervisors of the County of Westchester*, 388
2. Whenever a case is presented falling within these exceptions, equity will interfere to arrest the excessive litigation, to prevent the irreparable injury, or to remove or prevent the cloud upon the title; where no relief can be had by *certiorari*, to review the proceedings, and unless the plaintiff can have an injunction, he will be without remedy. *ib*
8. Where a plaintiff has had an opportunity to interpose the defense of fraud and corruption in an arbitrator, in an action brought against

him upon the award, an injunction will not be issued to restrain the proceedings in that action, either before or after judgment. *Stover v. Cogswell*, 448

4. His remedy is to move, in that action, for such relief as the facts may show he ought to have, in respect to the judgment which has passed against him, therein. *ib*

5. An injunction will not be issued to restrain the prosecution of an action pending in the same court, unless it appears from special circumstances, that relief cannot be had by motion or petition in the cause. *The Erie Railway Co. v. Ramsey*, 449

6. This was decided in *Schell v. The Erie Railway Company*, (51 Barb. 888,) and that is all that it was intended by the court to decide, there, viz., that such an injunction is irregular. *ib*

See TRADE-MARKS.

INSOLVENT DEBTORS.

See COUNTY COURT, 2.
FRAUD, 4.

INSURANCE, (FIRE.)

1. A party holding a contract for the purchase of premises from the owner, on which he has made payments, has an insurable interest in the premises. *Acer v. The Merchants' Ins. Co. of Hartford*, 68

2. And although a third person, to whom such party has contracted to sell the premises, has without his consent, obtained a conveyance from the owner, this will not affect such party's rights. Such third person, having full knowledge of those rights, will hold the title subject thereto. *ib*

3. Such party still has the equitable title, until his rights are adjusted. His right is not a conditional right, but an absolute right, to the extent of his ownership, or equitable title. He is therefore not guilty of any fraud which will vitiate a contract of insurance, in representing himself as the owner of the property. *ib*

4. A policy of insurance, issued to the plaintiff by the defendant, contained this condition: "If the assured, or any other person or parties interested shall have existing, during the continuance of this policy, any other contract or agreement for insurance, (whether valid or not,) against loss or damage by fire, on the property hereby insured, not consented to by this company," &c., "then this insurance shall be void and of no effect," &c. Held that the "other persons or parties interested," specified in the condition, referred to parties interested in the plaintiff's insurance, merely; and that it was not the understanding or intention that any other person who might have a separate interest in the property, and not connected in interest with the plaintiff, and having no interest in his insurance, might avoid the plaintiff's contract by obtaining an insurance of his own interest in the property, without the plaintiff's knowledge or consent. *ib*

5. The omission of a party insured to deliver a particular account of his loss and damage, as required by one of the conditions annexed to the policy, is fatal to his right to recover upon the policy. *Owen v. The Farmers' Joint Stock Ins. Co.*, 518

6. Such a provision is a condition precedent, the performance of which, by the insured, is indispensable to his right of recovery, unless it has been dispensed with, or waived, by the insurers. *ib*

7. Time is of the essence of the contract, in conditions of this kind, and there is no power in the court to dispense with the condition, or excuse the nonperformance of it. *ib*

8. It is only when a duty is created by the law that a party is excused from performing it, if performance is rendered impossible by act of God, and not when the duty is created by contract. *ib*

9. Conditions of this kind, in a policy of insurance, are designed and inserted for the benefit of the insurer, and may be waived by him; and the courts should construe them most liberally in favor of the assured, and most strictly against the insurer. *ib*

10. A policy contained a condition that in case of loss, the assured should deliver a particular account thereof to the insurers within ten days. A loss occurred on the 20th of May, 1868. Notice was given, immediately afterwards, to the agent of the insurers at the place where the premises were situated. On the 10th of June, the insurers' general agent and adjuster of losses, with one of the directors and a member of the executive committee, came to the place where the premises were situated, for the purpose of settling the loss. On the 1st of July said agent came a second time, stating that he came to adjust the loss. Being told that the assured was absent, and that the proofs of loss had not yet been prepared, he said it would make no difference; that the proofs could be made up and sent when the assured returned. Upon the return of the assured, on the 14th of August, the proofs were mailed to the insurers, who, after keeping them ten days, returned the same to the assured, then informing him, for the first time, that they intended to contest the claim. *Held* that these facts constituted a distinct recognition of the liability of the insurers for the loss, after the expiration of the ten days for the service of the preliminary proof. And that this was sufficient to establish a *waiver* of such proof within the ten days. *ib*

11. The general agent of an insurance company has power to bind the company, by making such a waiver. *ib*

12. The fact that insurers, after the time for furnishing the preliminary proofs has expired, put their resolution to contest the claim upon other grounds than the omission to furnish such proofs, is a waiver of that ground of defense. *ib*

18. A policy of insurance was taken at the instance of the insurers' agent, and in exchange for one he had previously issued as the agent of another company. The application was written by such agent, and the name of the assured was put to it by such agent. It was stated therein that there were no incumbrances on the property. It was shown that nothing was said by either party about any incumbrance or lien by

judgment, when inquiry was made about incumbrances; or any thing suggesting any necessity or occasion to speak about judgments. *Held* that the inquiry suggested in the application, in respect to incumbrances, was, in fact, and should be in law, limited to mortgages, or incumbrances creating a specific lien on the land. And that the assured was not called upon to say anything about judgments. *ib*

14. *Held, also*, that in this view of the statement in the application that there was no incumbrance on the property—whether it were viewed as a warranty, or as a representation—there was in fact no intentional concealment or misrepresentation, although there were, at the time, judgments which were liens upon the premises; and that the refusal of the judge to nonsuit upon that ground was not erroneous. *ib*

15. When asked if the premises are incumbered, the applicant, in his answer, need go no further than to mention all specific liens upon the land by mortgage, contract to sell, charges upon the property by will or otherwise, or certificate of sale by the sheriff, if the premises have been sold on execution upon any judgment. *ib*

J

JUDGMENT.

1. Where a verdict is according to the very right of the case, upon the facts found, the judgment will not be disturbed on any question of form, when there is no exception involving any error in matter of law. *Rainsford v. Rainsford*, 58

2. A judgment rendered by a justice of the peace, on a dilatory plea, viz., upon an issue as to the misjoinder of parties, although it terminates the action, does not affect the right of action on the merits; nor can it be set up as a bar to a subsequent action for the same cause. *Vaughan v. O'Brien*, 491

8. Where a judgment is reversed, on appeal, upon technical grounds not

involving the merits, the action constitutes no bar to a second action for the same demands. *ib*

4. A simple judgment of reversal has the same effect, in that action, as a judgment of nonsuit. And where the ground of reversal does not appear, the *onus* of proof is on the party who, in a subsequent suit, relies upon the adjudication as a bar. He must make it appear that the precise point was considered and passed upon in the former suit. *ib*

See CORPORATIONS, 6 to 9.
INSURANCE, (FIRE,) 18, 14.
JUSTICE OF THE PEACE.
MECHANICS' LIEN LAW, 8, 4, 5.
PRACTICE, 1.

JUDGMENT CREDITORS.

See PRACTICE, 1.

JURISDICTION.

1. When a court of equity obtains jurisdiction of an action for any purpose for which it is authorized to give judgment, it holds such jurisdiction for every other purpose; especially for the purpose of giving effect to its judgment. *DeBomer v. Drew*, 488
2. Hence, if the court has obtained jurisdiction of an action against a foreign corporation by its appearance by attorney, it has power, after judgment rendered in such action and execution returned unsatisfied, to appoint a receiver of the property and effects of the corporation. *ib*

See ATTACHMENT.
CORPORATIONS, 1, 2.
PRACTICE, 1.

JURY.

See CRIMINAL LAW, 9
RAILROAD COMPANIES, 16, 17.
STREETS AND AVENUES, 5.

JUSTICE OF THE PEACE.

1. Where a justice of the peace, after rendering a judgment in favor of the

plaintiff, by mistake entered the same in his docket as a judgment in favor of the *defendant*, and a transcript of such judgment being filed and docketed in the county clerk's office, the plaintiff was compelled to pay the judgment; *Held* that an action could be maintained by the latter, against the justice, as for an act of ministerial negligence and carelessness by which the plaintiff had been directly injured. *Christopher v. Van Liew*, 17

2. Such a case does not fall within the rule of judicial impunity for acts done by a judicial officer in the trial of causes and rendition of judgments; it being settled that the act of entering the judgment in the docket, by a justice, is a ministerial act, and is no part of the judicial function of rendering the judgment. *ib*

3. Where a justice swore that from the evidence before him in a case he "*found his judgment* against the defendant and in favor of the plaintiff, for the sum of, &c., but upon entering *said judgment* in his docket he by mistake inserted the name of the defendant in the place of that of the plaintiff;" *Held* that this was to be understood as an averment that the justice had reduced his judgment to form, by his official act, and then made the mistake in entering the judgment so formed, upon his docket; and that the error was ministerial. *ib*

4. *Held also*, that the justice had the right to correct such a mistake in his docket, the moment he discovered it; the error being merely clerical. *ib*

See AGREEMENT, 1.
APPRENTICES.
JUDGMENT, 2.

L

LANDLORD AND TENANT.

See LEASE.

LARCENY.

See CRIMINAL LAW, 1 to 7.

LEASE.

1. On the 28th of September, 1847, the defendant took a lease of certain premises from the plaintiff for twelve years, covenanting to pay rent therefor. Under this lease he took or accepted possession, and repeatedly paid rent. He never relinquished this possession, never paid rent to any other landlord, never attorned to any other landlord, and was never ousted or disturbed in the possession which he held under the plaintiff. *Held* that it was no defense to an action upon the lease, for rent, that the defendant, when he took such lease from the plaintiff, was in fact holding under an old lease from G., which he delivered to the plaintiff, but upon the understanding that if it turned out that the plaintiff was not the owner of the land the old lease was to be restored and the rent money paid back; that one C. was in fact the owner, at the time the lease was given; and that the defendant then informed the plaintiff that C. claimed the land. *Hardy v. Akerly*, 148
2. The title of C., relied on as a defense, was at most an equitable title, claimed to arise under an agreement with W. C., the plaintiff's grantor, made prior to the lease sued on, whereby C. agreed to convey to W. C. certain city property in exchange for lands in Ulster county, which C. was to select. C. did so convey, and selected this farm, among others, and W. C.'s agent executed a sort of livery of seisin to him, by plucking some tufts of grass, and stating that he delivered possession to C. *Held* that this was insufficient to defeat the plaintiff's action; C. having never in fact taken possession, nor undertaken to enforce payment of the rent; and having never had the legal title, which remained in W. C. until it was transferred by him, by deed, to the plaintiff. Under such circumstances the defendant should not be heard to dispute the title of the plaintiff. *ib*
8. *Held, also*, that there having been no eviction of the tenant, no paramount title shown, and no attornment to the party holding a paramount title, it might well be doubted whether the defendant could defend under a

paramount title without divesting himself of the possession acquired from the plaintiff. *ib*

LEGACY.

See WILL.

LEGISLATURE.

The legislature is not restricted in power, by the constitution, from controlling or changing the term, or the fees, of an office; or from abolishing an office created by it, altogether. The incumbent possesses no vested right in an office. *The People ex rel. Wilbur v. Eddy*, 298

See CORPORATIONS, 12, 13.

POWER.

STREETS AND AVENUES, 6.

LIBEL.

See HUSBAND AND WIFE.

LIEN.

See MECHANICS' LIEN LAW.

LIMITATIONS, STATUTE OF.

See CORPORATIONS, 6.

M

MANDAMUS.

Where the real estate connected with an asylum belonged to the State, upon which property there was a mortgage for \$60,000 about to fall due, and no funds applicable to the payment of it, except the funds in the hands of the treasurer; and the legislature passed an act requiring the commissioners of the land office to examine into the management of the asylum by the superintendent and other officers of the institution, and take such action (if any) to protect the interest and property of the State, in said asylum, as they might deem necessary; *Held*, 1. That the facts were sufficient to justify the commissioners in causing the funds of the corporation to be secured and placed in the custody of

a person selected by themselves.

2. That the power vested in the commissioners was *quasi* judicial, and wholly discretionary. 8. That such a discretion, except in a case of palpable abuse, was beyond judicial control by the writ of *mandamus*. 4. That the only conceivable limit on the power vested in the commissioners was that their action should be reasonable, and adapted to the object the legislature intended, viz., the protection of the interest and property of the State. 5. That the action of the commissioners, in assuming the control of the funds of the corporation, and of its books, papers and vouchers, and in directing the treasurer to hold them subject to their control and direction, was unobjectionable, and was a good defense to an application for a *mandamus*, commanding such treasurer to pay over the moneys, and to deliver the books and papers, in his possession, to his successor in office. *The People ex rel. The New York Inebriate Asylum v. Osborn*, 668

MAPS.

See EVIDENCE, 6.

MARRIAGE.

1. A valid marriage, to all intents and purposes, is established by proof of an actual contract, *per verba de presenti*, between persons capable of contracting, to take each other for husband and wife; especially where the contract is followed by cohabitation. *Van Tuyl v. Van Tuyl*, 285
2. No solemnization or other formality, apart from the agreement itself, is necessary. *ib*
8. Nor is it essential to the validity of the contract, that it should be made before a witness. *ib*
4. Yet a contract, *per verba de presenti*, constitutes marriage only when the parties intend that it shall do so without any subsequent ceremony. A proposition to cohabit as man and wife, with an assurance of a future marriage, would be a nullity. *ib*

MARRIED WOMEN.

1. An action at law, seeking an ordinary pecuniary judgment, as upon a personal contract, is not maintainable against a married woman who, without consideration and without benefit to her separate estate, and simply as the surety of her husband and for his accommodation, indorses his note. *The Corn Exchange Insurance Co. v. Babcock*, 222
2. In order to create a valid charge upon the separate estate of a married woman, there must be a specific description of the property, in the instrument creating it, executed according to legal formalities, and enforced in equity, under a complaint seeking as relief, not a general judgment, but the satisfaction of the charge out of the specific property subjected thereto. *ib*
8. Such a charge cannot be created by a married woman's accommodation indorsement of a promissory note, in these words: "For value received I hereby charge my individual property with the payment of this note;" where the attempted charge is not founded upon any benefit to her separate estate, or upon any matter in which she has an interest, or on account of which she has received any consideration. *ib*
4. Section 3 of the act of 1862, chap. 172, empowering a married woman, possessed of real estate as her separate property, to bargain, sell and convey the same, and to enter into any contract in reference thereto, refers to such modes and forms of bargain and sale and conveyance of real estate, and contracts relative thereto, as were recognized as legal, and were in conformity with the law existing at the time, and does not sanction a charge or contract of the kind above mentioned. *ib*
5. Section 7 of that act, authorizing a married woman to sue or be sued in all matters having relation to her sole and separate property, in the same manner as if she were sole, refers mainly to her right and liability to sue and be sued without having her husband joined with her, and was not intended to subvert the

rules of law or legal proceeding then existing in regard to the essential characteristics of such actions, or the kind of relief to be sought, or the mode in which it is to be reached.

ib

See HUSBAND AND WIFE.

MECHANICS' LIEN LAW.

1. Proceedings to foreclose a lien, under the mechanics' lien law, are purely *in rem*, founded on statute, and cannot be used for any other purpose than such as the statute contemplates. *Grant v. Vandercook*, 185
2. Such proceedings operate only as a foreclosure of the lien, and not as an action for the collection of a debt. ib
3. The judgment in these proceedings is designed to enforce the lien; and unless one is recovered and docketed during the life of the lien, i. e., within one year from the time of the creation of the lien—none can be recovered afterwards. ib
4. A judgment recovered after the expiration of the year is unauthorized and void, and will be vacated on motion. ib
5. If the lien has expired or failed, no judgment whatever can be rendered for the claimant. He cannot convert his proceedings into an action for the recovery of money upon a personal contract, and insist upon the defendant's personal liability. ib
6. Section 2 of the mechanics' lien law (*Laws of 1854, ch. 402*), gives a lien against the *owner*, to the extent of his interest, upon a house, and upon the land on which it stands, for labor done upon, and materials furnished for, such building, upon compliance with the provisions of that act. *Copley v. O'Neil*, 299
7. Unless the person proceeded against is owner, there can be no lien; and if there is no lien there can be no judgment, under the act. ib
8. Thus, where the defendant, who was guardian of his infant daughter, erected a house upon land owned by her; *Held* that he could not,

as such guardian, without authority from a competent court, build a house upon the land of his ward, and charge the expense upon the ward, or create a lien upon the property for labor and materials, in favor of the mechanics employed. ib

See GUARDIAN AND WARD.

MERGER.

See CRIMINAL LAW, 2.

MISTAKE.

See ESTOPPEL, 5

JUSTICE OF THE PEACE, 4.

MONEY HAD AND RECEIVED.

See PARTNERSHIP, 1.

MUNICIPAL CORPORATIONS.

1. A municipal corporation has no authority, under the act of the legislature of May 18, 1869, (*Laws of 1869, ch. 907*), to issue its bonds for the purpose of aiding a railroad corporation in constructing a railroad, where such railroad company has no authority, under its articles of association or otherwise, to construct a railroad, or any part of it, in the county in which such municipal corporation is situated. *The People ex rel. Averill v. The Adirondack Company*, 656
2. There must be a corporation capable of receiving the aid, in the manner offered, as well as a corporation to bestow the aid. ib
3. An order of a county judge, appointing commissioners under the act of the legislature of 1869, chapter 907, based upon a petition of taxpayers which is conditional, and not absolute, being conditioned that the avails of the bonds to be issued by a city in aid of a railroad company shall be used exclusively in the construction of a railroad within a particular county—a county in which the railroad company has no right to construct a road—is void. ib

See ADIRONDACK COMPANY.

N

NATIONAL BANKS.

1. The statutes of the State of New York against usury do not apply to loans made by national banks organized under the act of congress, passed June 8, 1864, entitled "An act to provide a national currency," &c. *First National Bank of Whitehall v. Lamb*, 429
2. In regard to the express provisions of that act, the federal government has exercised its sovereign power over the law of these institutions; and to that extent its power, and its enactment, is exclusive. The State law penalties have no application to the system. *ib*
3. Although the statute has subjected national banks organized under its provisions to the judicatories of the State, so that as to the form of the action and the proceeding in its courts, the State system of practice is, and must be adopted; the federal government not having in that particular expressly asserted its own power; yet in whatever court the action may be pending, the law prescribed in the express provisions of the act of congress is sovereign and exclusive. *ib*

NEGLIGENCE.

See AGREEMENT, 1.

CARRIERS.

RAILROAD COMPANIES, 10, 11, 12, 16.

O

OFFICE AND OFFICER.

See LEGISLATURE.

TOWNS.

ONUS PROBANDI.

See EXECUTION, 8.

JUDGMENT, 4.

OPINIONS OF WITNESSES.

1. Opinions can only be given by witnesses who are possessed of skill or science, upon the subject on which their opinions are asked. *Slater v. Wilcox*, 604
2. The degree of skill and science possessed is a question of law, for the court to determine, and which, in the appellate court, can be reviewed. *ib*
3. A liberal rule should be applied in regard to evidence concerning diseases in animals; it being rare that persons can be found who make the treatment of diseases in domestic animals a distinct profession, or attain to great skill or science therein. *ib*
4. The best skill and science that can be expected—all that can be practically admitted, in such cases—is the evidence of persons who have had much experience, and have been for years made acquainted with such diseases, and their treatment. They may give their opinions upon such experience, and on statements of fact upon which their opinions are based, as *some* evidence, to be considered and weighed. *ib*
5. Where, in an action to recover damages for a breach of warranty, in the sale of a cow, a witness, after stating that he had owned cows that had the horn distemper, and had doctored them, was asked "how does the horn distemper affect a cow?" *Held* that although the form of the question might be deemed to call for an opinion, yet that an answer stating the witness's experience in such cases, being as to a matter of fact, was admissible, not as an opinion, but as a fact. *ib*

P

PARENT AND CHILD.

1. Where the mother of a child who is fatherless, is abundantly competent to provide for her, and there is no allegation of her unfitness, she is the proper person to have the custody of the child, instead of strangers. *The People ex rel. Barbour v. Gates*, 291

2. In such a case the preferences of a child nine years of age will be entirely disregarded. *ib*

See APPRENTICES.

PRINCIPAL AND AGENT, 6.

PARTIES.

The law of this State no longer permits actions to be prosecuted in the name of nominal plaintiffs. The moment the fact appears that the plaintiff is not the real party in interest, the action is ended; no matter what is the character of the instrument on which it is founded; whether negotiable or not; or whether the defendant has or has not, any defense to the indebtedness. *Eaton v. Alger*, 179

See HUSBAND AND WIFE.

PROMISSORY NOTES, 15, 16, 17.

PARTNERSHIP.

1. When one partner becomes liable to his copartner, in an action at law, for the portion of partnership funds in his hands belonging to such copartner, the form of such action is properly for money had and received by the defendant to the use of the plaintiff. *Rainsford v. Rainsford*, 58
2. The cases in this State are quite uniform in holding that there must be not only a settlement, but an express promise to pay, before an action at law by one partner, to recover his share of the partnership moneys, against another partner, can be maintained. *ib*
3. One member of a partnership firm cannot become the individual owner of the partnership property, without the consent, and against the wishes, of the other member. *Comstock v. Buchanan*, 127
4. Although one partner may sell the property of the firm, and give a good title, to a third party, he cannot sell to himself. *ib*
5. A sale to himself is simply void; no right or interest passes; the legal and equitable title remains as it was

before the attempted transfer. It is still the property of the firm, though standing in the name of the individual partner. *ib*

6. Thus, where stock belonging to a partnership firm was surrendered by one of the partners, without the knowledge or consent of his partner, to the company, he representing to the secretary that he had authority from, and the consent of, his partner to do so, and procured new scrip to be issued to him, in his own name, in lieu thereof; *Held* that the transfer was fraudulent and void; and that an assignee of the partner not consenting to the transfer could maintain an action to have the stock restored, and the title thereto placed in the name and under the control of its rightful owners, subject to such equities as existed against it at the time of the sale to him. *ib*

7. In an action between partners, for a settlement of the copartnership affairs and to recover a balance claimed by the plaintiff to be due to him, a receiver will not be appointed to sell stock owned by the parties jointly, though in proportions dependent on the state of the partnership accounts, before it is judicially determined how much of the stock belongs to each party; where no insolvency is alleged, and the defendant denies the entire equity of the complaint, and offers and consents that one half of the stock may be transferred to the plaintiff, and to give security to indemnify him for any balance he may establish in his favor. *Buchanan v. Comstock*, 568.

See COMPLAINT, 8.

EXECUTORS AND ADMINISTRATORS.

PATENT.

See ESTOPPEL, 8.

PROMISSORY NOTES, 8.

PLEADING.

1. Under our present system, if a pleading is not so bad as to show on its face that it is frivolous, no argument should be allowed, and the party should be left to a demurrer. *The Joseph Dixon Crucible Company v. The New York City Steel Works*, 447

2. A pleading, to be frivolous, must show its defects on the first inspection. *ib*

See COMPLAINT.
PROMISSORY NOTES, 10.

POWER.

1. Whenever a statute grants the power to do an act, with an unrestricted discretion as to the manner of executing the power, all reasonable and necessary incidents in the manner of executing the power are also granted. *The People ex rel. Wilbur v. Eddy*, 598
2. Hence, although a statute is very summary in its grant of power, and fails to prescribe the form of proceeding to effect the desired object, it is not for that reason unconstitutional and void. *ib*

See LEGISLATURE.

PRACTICE.

1. For defects or irregularities not affecting the jurisdiction of the court, and where no fraud or collusion is imputed, the remedy is given to the party, alone; and another judgment creditor is not entitled to have such proceedings or judgment set aside. *Gore v. Gundlach*, 18
2. An order for a substituted service of the summons and complaint, obtained upon a sheriff's return that the defendant cannot be found, that the summons and complaint cannot be served personally, and that he has left to avoid proceedings against him by his creditors, and upon an affidavit which does not contain the statements required by chapter 511 of the laws of 1858, as amended by chapter 212 of the laws of 1863, is not warranted by the statute; and a service made under it will not confer jurisdiction. *ib*
8. A general exception to the charge of the court, not specifying any grounds of error, is of no avail, where there is no request to charge otherwise. *The People v. Smith*, 46

4. Where an action was tried wholly upon the issue whether the plaintiff, or her husband, was the defendant's partner in business, and the judge charged the jury that the plaintiff was entitled to recover her share of the assets, as ascertained by a settlement and balance struck, if she was the partner of the defendant; *Held* that the defendant having taken no exception to the charge, he must be deemed to have acquiesced in that view of the case, and could not object or except on appeal. *Rainsford v. Rainsford*, 58
5. A mere general exception to a judge's charge, where there is more than one point in such charge, and any portion of it is unexceptionable, is of no avail, if there is nothing to show to which part or proposition in the charge it is intended to apply. *McAndrews v. Santes*, 198
6. Upon a trial by the court the successful party is under no obligation to submit a draft of the judgment to the adverse party, for amendments. The court may, in its discretion, require it, and direct that the judgment be settled before itself or one of its members. *The People v. The Albany and Susquehanna Railroad Co.* 204
7. In case the decision of the court fails to find upon all the facts deemed by the unsuccessful party to be material, his remedy is to propose a finding thereon in his proposed case and exceptions; and it is the duty of the judge, on the settlement thereof, to pass upon the same and to find as requested, or to refuse to so find, so that the party may have the benefit of an exception to his refusal. (*See note b.*) *ib*
8. An order staying all proceedings on the "decision" of the court, if not served until after the entry of judgment, becomes *functus officio*, and does not operate as a stay of proceedings after judgment. *ib*
9. An order staying all proceedings under a judgment does not, *it seems*, stay an independent proceeding against a receiver in the action, to compel him to surrender property he is ordered thereby to deliver to the successful party. *ib*

10. If otherwise, an order directing such surrender can only be attacked on a direct proceeding to set it aside. *ib*

11. Proceedings to compel the delivery of property, upon a judgment for costs and the delivery of property, are not stayed by an undertaking conditioned to pay such costs and the costs of the appeal. *ib*

12. If a party has been exercising his legal right, the court cannot inquire into his motives for so doing. *ib*

13. It is proper and quite usual for the court, especially in cases where the findings are long, to furnish the attorney of the successful party with a brief minute of its decision, and request him to prepare proposed findings of fact and conclusions of law. When corrected and signed, the court usually delivers the decision to the successful party, to be filed. *ib*

14. Matters set forth in motion papers, or filed, which are not material to the decision, are impertinent, and if reproachful, are scandalous, and may be suppressed by the court on inspection. *ib*

15. A motion to set aside an order appointing a referee to take the deposition of a witness, under section 401 of the Code of Procedure, must be made by the witness, himself, and not by the adverse party. *Ramsey v. Gould*, 898

16. In deciding cases submitted under section 872 of the Code, the court is to draw from the facts stated such conclusions as a jury would be warranted in drawing, if the case was on trial before them. *MORGAN, J.*, dissented. *Clark v. Wise*, 416

17. When a second motion is based upon a new state of facts arising since the first decision was made, it is not necessary that leave to make the motion should be obtained. It may be made as a matter of right. *The Erie Railway Company v. Ramsey*, 449

18. A motion on the part of defendants, on 12 hours' notice after serving papers at Albany, to vacate a

stay of proceedings made at Delhi; and a stay of proceedings served at New York at about 10 o'clock A. M. on the 31st of May, to prevent the making of a motion at Delhi or Binghamton, on that day, cannot be said to be proper and orderly proceedings consistent with a due administration of justice. *Ramsey v. The Erie Railway Company*, 450

19. To give an order staying proceedings on a motion vitality, it should be served in time to be communicated to the counsel acting at the court where the motion is to be made. *ib*

20. If such counsel takes an order in pursuance of the notice of motion, without any knowledge of a stay of proceedings having been granted, although an order for a stay had about that time been served, in a different city, his proceeding will not be irregular. *ib*

See AMENDMENT. APPEAL.

PRINCIPAL AND AGENT.

1. It is a well-settled rule of equity jurisprudence that all gifts, contracts or benefits from a principal to one occupying a fiduciary or confidential relation to him are constructively fraudulent and void. *Comstock v. Comstock*, 458

2. The court, in such cases, acts upon the principle that if confidence is reposed it must be faithfully acted upon; if influence is acquired it must be kept free from the taint of selfish interest, and conniving and over-reaching bargains. *ib*

3. It is for the common security of all mankind that gifts procured by agents, and purchases made by them, from their principals, should be scrutinized with a close and vigilant suspicion. So of notes, bills, contracts, releases and obligations. *ib*

4. Agents are not permitted to deal with their principals, in any case, except upon showing the most entire good faith, a full disclosure of all the facts and circumstances at-

tending the transaction, and an absence of all undue influence or imposition. *ib*

5. Transactions which would be held unobjectionable between other parties are often declared void, if between persons occupying confidential relations. *Per JAMES, J.* *ib*

6. Where the relation of principal and agent existed between the parties to a note, receipt and contract, strengthened by the further and other relation of parent and child; and the parent, who was alleged to have executed the papers, was old and feeble, being at least seventy-seven years of age when the first bore date, and living with her son, the other party to instruments which were in his handwriting, and for his benefit; no object, benefit or advantage to her appearing; and there were other suspicious circumstances; and the party claiming under the instruments, merely proved the signature of the other party thereto, without offering any evidence of the facts and circumstances under which they were made; of their consideration, object and purpose; of their freedom from undue influence or imposition; or of good faith; *Held* that without assuming the existence of actual fraud, the claimant occupying a confidential relation to the other party, as her agent, at the time the instruments purported to be executed, they were, because of that relation presumptively fraudulent and void, as to her, or her representatives; which presumption could only be overcome by actual proof. *ib*

See INSURANCE, (FIRE) 10, 11.

PROMISE.

See AGREEMENT, 1.
PARTNERSHIP, 2.

PROMISSORY NOTES.

1. As to the payee of a note, no notice of the want or failure of the consideration is necessary to constitute it a defense. *Saxton v. Dodge,* 84

2. Where several payees of a promissory note unite in indorsing the same to one of their number, the latter acquires the interest only of his associate payees, in the note, and is not entitled to protection as a purchaser for value. *ib*

8. And if, in an action brought by him upon the note, the answer sets up a total want of consideration for the note, in matter and manner sufficient to defeat the action, had it been brought in the name of the payees, it is not necessary to allege notice to, or knowledge in, the plaintiff, of the entire worthlessness of the consideration. *ib*

4. Where all the other joint payees of a note transfer their interest to one of their number, and the action is brought by him, he stands upon the same footing, in respect to notice, that he did before. It is not in the power of several joint payees of a note to escape a just defense to it by such a contrivance. *ib*

5. If the payee of a note indorses it to himself, he does not in any respect change his position. An action upon it may be defended, as against him, upon the same principle after the indorsement as before. *ib*

6. He does not stand upon the footing of a *bona fide* indorsee and holder in the usual course of business, the same as though he had not been one of the original payees. *ib*

7. Parties claiming to have a patent, which gave them the exclusive right to make and vend certain reapers and mowers, gave a license to the defendants to make and vend such reapers and mowers, and also to sell territory, for a specified consideration, called license fees, which the defendants agreed to pay. They subsequently gave a note for those fees. In an action brought thereon, by an indorsee, the defense was that the patent was void and conferred no exclusive right whatever, upon the payees of the note, and that there was therefore a want of consideration therefor. *Held*, 1. That so far as the question of estoppel was concerned, the case stood upon the same footing as it would have

- done had the action been to recover the license fees. 2. That the defendants might set up a want of consideration for the note, as a defense to the action. *ib*
8. In an action upon a promissory note given for the purchase money of a patent right, where the defense is a total want of consideration, the inquiry into the validity of the patent, or of the license to sell under it, comes in collaterally only by way of evidence. In such a case this court may inquire into the validity of the patent as well as anything else, for the purpose of determining the question of consideration. *ib*
9. The true test, in all such cases, is whether the judgment upon the issue, allowing the court to have jurisdiction, would affect or determine the right claimed under the patent. *ib*
10. An answer, in such an action, alleging, generally, that the plaintiff made false representations knowing them to be so, but not alleging that the defendants relied upon such statements, and entered into the contract supposing and believing them to be true, does not state facts sufficient to constitute the defense of fraud. *ib*
11. Where several payees of a promissory note unite in indorsing the same to one of their number and another person, the indorsees stand in the same situation, precisely, in respect to the defense of a want of consideration, that a payee does where the note is indorsed to him alone, by the other payees. *Saxton et al. v. Dodge et al.*, 116
12. And as, in the latter case, the note is open to the defense of a want of consideration without alleging notice of such want to him, so another person by becoming a holder jointly with the payee, or one of the payees, subjects himself to the same defense. *ib*
13. It will not do to allow a payee to get rid of a defense by transferring a share in his obligation to another. *Per JOHNSON, J.* *ib*
14. By taking an interest or share only in the note he must be held to take subject to any defense which may lawfully be interposed against his co-indorsee. *ib*
15. In an action upon a promissory note, brought since the Code, the defendant has a right to prove that the plaintiff is not the real owner of the note sued on. *Eaton v. Alger*, 179
16. If the plaintiff is not a regular indorsee or holder, but holds the note merely as agent for the payee, against whom the defendants claim to have a good defense, they are interested in questioning the plaintiff's title, and have the right to show his want of interest. *ib*
17. If the plaintiff is not the real party in interest, that, of itself, under section 111 of the Code, is a bar to all further proceedings in the action, and a complete defense, as against the plaintiff. *ib*

*See PARTIES.
STAMPS.*

PROVISIONAL REMEDIES.

See ATTACHMENT.

R

RAILROAD COMPANIES.

1. On a question whether an action can be maintained, or not, against the officers of a railway company, to compel them to account for their official conduct in the management and disposition of its funds and property, and, upon allegations of abuse of trust and gross misconduct, to obtain their suspension and removal from office, if the plaintiff stands in the relation to the defendants, of a creditor or stockholder of the company, authorizing him to bring the suit, the court has no right to look into his motive in bringing it. *Ramsey v. Gould*, 898
2. And although, in moving such action, the plaintiff's malice is gratified, or his independent litigations incidentally subserved, still, unless the court can plainly see that he has no meritorious cause of action,

- or that he is estopped from prosecuting it, his prosecution of it will not be deemed a perversion or abuse of the process of the court. This is equally true in a court of equity, as in a court of law. *ib*
8. The inquiry in each court must be with reference to the plaintiff's right of action, and whether in it are involved interests entitled to the protection of the court, and not to his ulterior motives and purposes in bringing the suit. *ib*
4. If, in an action against the officers of a railway company, to compel them to account for their official conduct and to obtain their suspension and removal from office, on the ground of misconduct and abuse of trust, the plaintiff is, in fact, the owner of bonds and stock of the company, he is *personally interested* in obtaining the relief sought by him; and this being so, the court, in inquiring whether the action is prosecuted for the purpose of obtaining that relief, or for the mere abstract purpose of "bringing men to justice," must look to the cause of action shown, and the judgment demanded, in the complaint, rather than to motives or purposes elsewhere avowed, or shown to exist. *ib*
5. In such an action the plaintiff has no inequitable advantage which he is seeking to enforce against the defendants. His buying the stock and bonds of the company was no wrong done them, with whatever intent it was done. The relative rights of the parties are the same as if the suit were brought by the plaintiff's vendor. The intent with which he purchased does not change or affect those rights, or raise any equities respecting them, in favor of the defendants. In regard to them, his hands are "clean," and the rule of equity requires no more. *ib*
6. His bringing the suit, after having become invested with the bonds and stock, is not *bad faith*, such as the courts will relieve against. *ib*
7. There are no cases where the courts have perpetually stayed proceedings as being against *good faith*, except where the suits were brought in violation of some arrangement or understanding between the parties. *Per PARKER, J.* *ib*
8. If the plaintiff can, as a stockholder, bring the officers of a corporation into court, for any portion of the relief demanded in the complaint, the case cannot be summarily disposed of by a dismissal of the complaint, or an order perpetually staying proceedings in the action. *ib*
9. Where the plaintiff brings the action on his own behalf and on behalf of all others having a common interest, and he alleges that the officers named as defendants control the company, he may, as a *stockholder* maintain the action for such portion of the relief demanded as does not depend upon the authority of the statute relative to "proceedings against corporations in equity," although he be not a *creditor* of the company. *ib*
10. The defendant was running a railroad belonging to another corporation, and using it for the ordinary purposes of a railroad, for its own benefit, under and by virtue of a written agreement with the owners, and for a period of time only fixed by the terms of a lease made to another corporation, and assigned to the defendant, who agreed to pay the rent reserved in said lease. *Held* that the defendant was a *lessee* of such road, within the meaning and intent of the general railroad act of 1850, and the act of 1864, amending the same and extending its provisions to the *lessees* of any railroad. And that as such lessee, it was liable for the value of a cow killed by its engine upon the track, in consequence of the defendant's neglect to maintain fences and cattle-guards as required by the statute. *Burchfield v. Northern Central Railway Co.*, 589
11. The term *lessees*, in the statute, is to have such a construction as was intended by the legislature, to meet the then known and existing condition of things; to meet the case of parties using a road, as the substitute for the owners, and exercising the rights of owners, under some right or permission, for a consideration to be paid to the owners. *ib*
12. In an action to recover damages for a personal injury occasioned by

negligence, if the facts proved establish negligence on the part of the defendant, the court should not order a nonsuit, unless the conduct of the plaintiff was, *per se*, negligence contributing to the injury. *Phillips v. Rensselaer and Saratoga Railroad Co.*, 644

18. It is the duty of a passenger who intends taking the cars, upon a railroad, to use reasonable diligence in inquiring as to the time and manner of entering and taking his seat therein. But if the railroad company has made no rules and regulations on that subject; or, if made, has given them no publicity by signs, card-boards or other notices, as to a particular station at which they receive and discharge passengers; then the case is left to be settled by the common law duties and obligations of the railroad corporation, and the rights of the passenger who has purchased a ticket and is entitled to be carried therefor, in the cars. *ib*

14. In such a case, the passenger is left to find out, as best he can, as to the side, and place, and time, at which he may enter the cars; and he is justified in relying upon his observation of the custom of the company on prior occasions, as to the time, place and manner of receiving and discharging passengers at the same place, and may assume such to be the rules and regulations of the company, in that respect, and act upon that assumption, provided he acts with such prudence and care as a reasonable man is bound to exercise. *ib*

15. Where there was an absence of any passenger platform, to indicate the proper place for passengers to enter the cars; and though there was a narrow plank walk on the east side of the track, it was the custom of the railroad company to receive and discharge passengers on both sides; and the plaintiff himself, on former occasions, had been received and discharged on the east side of the track, as had other passengers, all along, for a distance of over 200 feet; *Held* that the company having permitted, if they had not actually adopted, this method of receiving passengers at the station in question, they must be regarded as respons-

ible for the safety of the regulation. That it amounted to an invitation, at least to those who had been thus received and discharged, to enter the cars upon either side of the track. *ib*

16. Although, ordinarily, the conceded fact that a passenger attempting to get upon a train while it is in motion, is, *per se*, such an act of negligence on his part, as to bar a recovery for injuries sustained, yet this is not an invariable rule. What is common or ordinary neglect, is much more matter of fact than of law. And in such a case, where the negligence of the plaintiff is claimed to have contributed to the injury, all the facts and circumstances constituting negligence, or those that are proper to be considered, should be left to the jury. *ib*

17. Where the plaintiff offered to prove that before the time of the injury sued for, he had got on and off the cars, at that place, when they stopped no more than they did at the time in question; and that he had knowledge that they frequently did not stop, any more than to slow down as they did at this time; *Held* that the judge erred in rejecting the evidence offered, and directing a nonsuit. That he should have submitted the testimony to the jury, upon a proper charge as to the law. MILLER, P. J., dissented. *ib*

See ADIRONDACK COMPANY.
BOND, 8.
MUNICIPAL CORPORATIONS.
TOWNS.

REAL ESTATE.

1. An instrument in writing by which a lessee for lives, of land, assumes, with the assent of the lessor, to convey to a purchaser all the wood and timber thereon, with authority to the purchaser, at any time thereafter, to enter upon the premises and take off the same, covers such an interest in land as constitutes a freehold estate. *Goodyear v. Voorburgh*, 248
2. No writing less than a deed legally executed is sufficient to divest the grantor of such an estate. *ib*

8. If the instrument by which it is attempted to be conveyed is not attested by at least one witness, it will not take effect, as against a purchaser or incumbrancer, until it is properly acknowledged by the grantor. *ib*

See STANDING TREES.

RECEIPT.

See PRINCIPAL AND AGENT, 6.

RECEIVER.

See FOREIGN CORPORATIONS, 2.
PARTNERSHIP, 7.

REFORMING INSTRUMENTS.

The authority which a court of equity has, to reform a written instrument does not extend to any alteration of a contract, but only to making the contract in which a mistake has occurred, correct, by conforming it to what was actually agreed upon between them. *Garnar v. Bird*, 277

See BOND, 1, 2.

S

SCIENTER.

See FRAUD, 2.

SHEEP.

See CONVERSION.

SHERIFF.

1. A sheriff, after having, in the manner prescribed by section 285 of the Code, executed an attachment upon a debt due from a third person to the defendant therein, may maintain an action against such debtor, to recover the amount of the debt attached, or so much thereof as will be sufficient to satisfy the judgment in the attachment suit; provided there was in fact an indebtedness existing from such debtor to the defendant in the attachment suit, at the time the attachment and notice were served on the former. *Lanning v. Streeter*, 88

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2. When an attachment is thus executed by serving upon the debtor a copy of the warrant, and a notice therewith showing the property levied on, the sheriff acquires a specific lien upon the debt, if there is one; and that is a sufficient interest to enable him to maintain an action for its recovery, or enough thereof to satisfy the judgment recovered in the attachment suit. *ib*

3. In order to enable the sheriff to bring the action, however, he must have actually levied upon such debt or property and subjected it to the attachment in his hands. *ib*

4. But where, in such an action, the sole cause of action alleged in the complaint was that at the time of service of the attachment the defendant in such action was indebted to the defendant in the attachment suit, for property received and converted into money, and for money had and received, in the sum of more than \$500, and that he had refused to pay the same to the plaintiff; and the referee failed to find that the defendant was indebted to the defendant in the attachment suit, at the time the attachment and notice were served on him, but merely found that the former had in his hands a specified sum, the property of and belonging to the latter; *Held* that no cause of action was shown. *ib*

5. Where property fraudulently assigned has been converted into money by the assignee, or the money has been converted into other property which is claimed by the assignee to belong to him, before an attachment in an action by the creditor is issued, the attachment cannot be levied upon the money or property so held as the proceeds of that assigned, and the sheriff can maintain no action against such assignee by virtue of the attachment in his hands, to recover such proceeds. *ib*

6. In such a case the avails are held by the fraudulent assignee as trustee for the creditors of the assignor, and can be reached only by an action in the nature of a creditor's bill, which a sheriff cannot maintain. *ib*

7. Where nothing but the debt is attached, the sheriff can only maintain an action against the alleged debtor by proving the existence of a debt from him to the defendant in the attachment suit which the latter could enforce by action. *ib*

SLANDER.

1. In an action for slander it is proper to allow the plaintiff, after giving evidence to prove the speaking of the actionable words alleged in the complaint, to prove the repetition of the same slanderous charge on other occasions, and subsequent to the commencement of the action. *Johnson v. Brown*, 118
2. Though the plaintiff, in such an action, cannot prove the speaking of other and different actionable words, charging a different offense, yet he may prove a repetition of the same charge. This is allowed, not for the purpose of proving a general malicious feeling or intention, on the part of the defendant towards the plaintiff, but to show the degree of malice with which the slander involved in the action was uttered. *ib*
3. It is not erroneous for the judge to charge the jury, in an action for slander, that even if the words were spoken with the qualification, "if reports were true," that will not change the actionable nature of the words. *ib*
4. A charge is equally slanderous and actionable, whether made in that form, or without the qualification. Nor can the mere fact of uttering an actionable charge in that hypothetical form go in mitigation of the damages. *ib*
5. The mere form in which a slanderous charge is uttered has nothing to do with the question of damages. *ib*

SPECIFIC PERFORMANCE.

1. If a contract for the sale and purchase of lands has been fairly obtained, without misapprehension, surprise, mistake or the exercise of any undue advantage, and it be not

unconscionable in its terms, the right of the parties to its specific performance is a settled and positive right, which a court of equity is bound to maintain and enforce. *Loose v. Morey*, 561

2. The objection that a claim for specific performance is not of equitable cognizance, because the plaintiff has a perfect remedy at law, on the contract, in an action for damages, is not available in a case where the contract is for the purchase and sale of lands. *ib*
3. In such a case, the vendee is not deemed to have a perfect remedy in an action at law for damages. He is entitled to proceed in equity, for a specific performance, although he may have another remedy at law, upon the contract. *ib*
4. As a vendor can maintain his action against the vendee, for a specific performance of the contract, if the latter refuses to accept the deed and pay the price agreed, so an action for a like purpose can be maintained by the vendee against the vendor. The rights of the parties to a contract of sale and purchase, to maintain such an action, are mutual. *ib*
5. Even inadequacy of consideration is no ground for refusing specific performance, unless it be so gross as to raise the presumption of fraud, unreasonableness, or great hardship. *ib*

STAMPS.

Where, at the time of executing promissory notes, the maker authorized and directed his agent to affix the proper stamps thereto, and to cancel the same; but such agent, through inadvertence and without any intent to evade the provisions of the revenue law, or to defraud the government of the stamp duty, neglected to affix the stamps, for several months; *Held* that the omission to affix the proper stamps, at the date of the notes, did not avoid the notes. *Vaughan v. O'Brien*, 491

See DEED, 1.

STANDING TREES.

1. It is well settled, in this State, that standing trees form a part of the

land, and as such, are real property.
Goodyear v. Vosburgh, 248

2. An owner in fee of the land has the same estate in the trees as in the soil, unless there has been a severance of ownership by such a conveyance as is adequate to effect it. *ib*

STATUTES.

A statute which merely enacts that all the expenses of laying out, working and grading an avenue shall be paid in the manner provided in another act, without limiting or specifying any amount of money or tax to be raised or applied, does not "state" the tax, as required by article 7, §§ 13, 14, of the constitution. The legislature cannot devolve upon the commissioners the power to *state the tax*. *Hanlon v. The Board of Supervisors of the County of Westchester*, 888

See APPRENTICES, 1, 2, 7.

ATTORNEY.

COMMISSIONERS OF HIGHWAYS, 2.
CORPORATIONS, 2, 3, 5, 6.

MANDAMUS.

MARRIED WOMEN, 4, 5.

MECHANICS' LIEN LAW.

MUNICIPAL CORPORATIONS.

NATIONAL BANKS.

RAILROAD COMPANIES, 10.

STREETS AND AVENUES, 1, 5.

TOWNS.

STOCK.

See AGREEMENT, 5.

ATTORNEY.

PARTNERSHIP.

TOWNS.

STREETS AND AVENUES.

1. Where commissioners were appointed, by an act of the legislature, to lay out an avenue, and commissioners of estimate and assessment were directed to be appointed, and the damages agreed upon or awarded, and the expense of working the road, were directed to be levied, assessed and collected as other town charges; but it appeared that, beyond taking the oath of office, and making a contract for the work, the commissioners had done nothing to

acquire jurisdiction; that they had not laid out the avenue, although it passed, partly, through private lands; that no map was filed until after an action to set aside their proceedings was commenced, when a map was filed with no date, except that of the year; that no other papers had been filed, with the town clerk; and that no commissioners of estimate and assessment had been appointed; *Held* that the commissioners had no authority to make a requisition for the damages and expenses of opening and working the road; and that the supervisors had no authority to direct the money to be raised, and their action on the subject was not simply illegal, but was wholly void. *Hanlon v. The Board of Supervisors of the County of Westchester*, 883

2. Although the remedy against unwise or unjust modes of taxation is to be sought from the legislative department, and not from the judiciary, yet the remedy against legislative encroachments upon the constitution is to be sought from the judiciary. *ib*

3. The provision of the constitution of this State, (*art. 1, § 7*), directing that when private property shall be taken for any public use, the compensation to be made therefor shall be ascertained by a jury, or by commissioners appointed by a court of record, cannot be waived by an owner of land, who chooses to make an agreement for the amount of compensation, so as to dispense with a jury or commissioners. *ib*

4. The determination of the amount of compensation is in the nature of a judicial proceeding, and where the amount is to be paid for by the public, the public, as a party in interest, have a right to that proceeding. *ib*

5. Under the act of the legislature for laying out Madison avenue, in Westchester county, (*Laws of 1869, ch. 850*), compensation to the land owners, for the land taken, must be assessed by a jury, or commissioners, before the commissioners named in the act can make a requisition upon the supervisors for the damages and expense of operating and working the avenue. *ib*

6. The legislature has power to appoint commissioners to lay out an avenue in a town, although there are already three commissioners of highways in such town, competent to act. Such commissioners are not town officers.

See ASSESSMENTS.

SURVEYS.

See EVIDENCE, 6, 7, 8.

T

TAXES AND TAXATION.

See CERTIORARI.
INJUNCTION, 1, 2.

TIME.

See INSURANCE, (FIRE,) 7, 10, 11, 12.

TITLE TO LAND.

See DEED.

TOWNS.

1. Where any commissioner, appointed under the act of March 31, 1856, authorizing certain towns to subscribe to the capital stock of the Albany and Susquehanna Railroad Company, (*Laws of 1856, ch. 64.*) and the acts amending the same, (*Laws of 1857, ch. 401; Laws of 1859, ch. 384.*) to borrow money on the credit of the town, shall refuse or neglect to perform any part of the duties specified therein, his office will thereupon become vacant, and the county judge, upon the application of twelve resident freeholders, and upon proof of the fact to his satisfaction, has jurisdiction to appoint some other person to fill his place. *The People ex rel. Wilbur v. Eddy*, 598
2. The act of 1859 (*ch. 384*) was in *pari materia* with the statutes of 1856 (*ch. 64.*) and of 1857 (*ch. 401.*) which authorized the appointment of commissioners and prescribed their duties; and they must all be construed to-

gether, as constituting one system, or one act. *ib*

8. And where, upon an application by twelve resident freeholders, to the county judge, and proof to him, he found, as facts, that commissioners appointed under the acts made a contract to sell stock subscribed for by them in the name of a town, on certain conditions, one of which was, that the purchasers should first have the use of the stock, to be voted upon at a future election of directors of the corporation, for certain persons named in the contract of sale; that they refused to sell the stock for cash, at par; and that they sold the same on credit; and the county judge thereupon adjudged and determined that it was the duty of the commissioners, if they sold the stock, to sell it for cash, at par; that for their neglect or refusal to perform that duty their offices had become vacant; and that the defendants should be appointed to fill their places; *Held* that the findings were legitimate, and the adjudication right. *ib*

4. The statute obviously intended to intrust the power of deciding the question whether commissioners appointed thereunder have refused or willfully neglected to perform any part of the duties of their offices, to the county judge; and while his action, like the action of all other inferior officers, can be made the subject of review by the Supreme Court, on *certiorari*, the practice, in that respect, as to reviewing facts, is, by analogy, to be governed by the same rules as are observed on appeals and *certioraris* from inferior jurisdictions in other cases, viz: if there is evidence in the case which will, when fairly weighed, sustain the decision, this court will not interfere upon the ground that in their opinion a stronger case has been made out by the unsuccessful party. *ib*

TRADE-MARKS.

1. The principle which underlies the doctrine of trade-marks is, that he who, by his skill, industry or enterprise, has produced or brought into market or service some commodity or article of use, convenience, utility

er accommodation, and affixed to it a name, mark, device or symbol which serves to designate it as his, is entitled to be protected in that designation from encroachment, so that he may have the benefit of his skill, industry or enterprise, and the public be protected from the fraud of imitators. *The Congress and Empire Spring Co. v. The High Rock Congress Spring Co.*, 526

2. The doctrine of trade-marks can have no application to a name given to a natural element in its natural state. *ib*

8. All the cases reported are cases where the marks infringed were used and applied to artificial compounds, products or manufactures originated by the science, skill, diligence or enterprise of man; and in all these cases the principle of the law is stated and restated as applicable to protect the skill, industry and enterprise of mechanics, manufacturers, and inventors; and hence only applicable to artificial products. *Per JAMES, J.* *ib*

4. Where the plaintiff, as owner of a mineral spring, called the "Congress Spring," and widely known as such, and its water by the designation of "Congress Spring water," for over seventy years, was entitled to the rights of its predecessors in the use of the word "Congress," and that word had previously only been used and applied to water in connection with said spring and its water; it was yet *Held* that as the water was not an artificial product, and there was nothing in the mode of bottling the water for sale, or the mode of sale, originating with the plaintiff, or the former owners, which the word "Congress" defined, designated or implied, the plaintiff had no exclusive right to the use of that word in connection with such business, or in connection with the word "water," or the words "spring water." *ib*

5. Accordingly *held* that the plaintiff was not entitled to an injunction against a corporation called the "High Rock Congress Spring Company," the owner of another mineral spring, named the "High Congress Spring," to restrain such corporation from using the name "High Rock

Congress Spring Company," or any name containing "Congress Spring Company," in its business of putting up mineral waters; and from using or putting upon any bottles, corks, boxes or packages, &c., the words "Congress water," or "Congress Spring water," either alone or in connection with other words, &c. *ib*

6. A name can only be protected as a trade-mark when it is used merely as indicating the true origin or ownership of the article offered for sale. Never when it is used to distinguish the article itself, and has become, by adoption and use, its proper appellation. *ib*

7. *Held* that within the above principle neither the plaintiff, or its predecessors, acquired, or could acquire, any property in, or exclusive right to the use of, the word "Congress," in connection with the word "water," or the words "spring water;" because that word had no relation to, and did not indicate the origin or ownership of the article named, but only designated the article itself, which designation had become, by adoption and use, its proper appellation. *ib*

TROVER.

See CONVERSION.

U

USURY.

See NATIONAL BANKS.

V

VENDOR AND PURCHASER.

1. Where wood is sold subject to inspection and measurement by a railroad inspector of wood, the purchaser is entitled to have the same actually measured by such inspector, or to have something done which will be equivalent to a measurement. He is not bound by the mere guess, or loose estimate by the eye, of such inspector, as to the quantity. *McAndrews v. Santee*, 198

2. Where a purchaser of land, after paying a portion of the consideration and promising to pay the rest, fails to do so, he cannot, on being sued for the balance of the consideration, set up his own breach of promise as a defense to the action, in this, that because he did not perform, the statute of frauds applies; where he, by reason of the performance by the vendor of everything on his part agreed to be performed, is in possession, and is enjoying the benefits of the estate purchased. *Caggar v. Lansing*, 421

8. One who purchases land with knowledge of another's right thereto under a contract of purchase, takes his title subject to such right; and that being so, either the deed to him will be set aside, or he will, with his wife, be directed to convey to the person having the prior right. *Loose v. Morey*, 561

See EVIDENCE, 1.
SPECIFIC PERFORMANCE.

W

WAIVER.

See AGREEMENT, 2.
APPEAL, 1.
BOND, 8.
INSURANCE, (FIRE,) 6, 9, 10, 11, 12, 18.
STREETS AND AVENUES, 8.

WAREHOUSEMEN.

See CARRIERS.

WARRANTY.

See FRAUD, 2, 8.

WILL.

1. A gift, by will, to an executor, of a sum of money as a compensation

for his services as such, over and above his commissions, stands in the same position, and partakes of the same character, as the commissions of an executor. It is not an absolute gift, and not such a devise or legacy as becomes forfeited under the statute, (2 R. S. 65, § 50,) by the legatee becoming a subscribing witness to the execution of the will. *Pruyn v. Brinkerhoff*, 176

2. Nor are a devise of real estate in trust to make partition, and for various special purposes, or a gift of personal estate in trust, forfeited by the devisee or legatee becoming a subscribing witness. *ib*

8. Whether the above statutory provision is superseded and amended by section 899 of the Code of Procedure? *Quere.* *ib*

WITNESS.

1. In a partition suit between the children of the husband by his first wife, and his children by a woman claiming to have been his second wife, the latter is a competent witness in behalf of her children, to prove their legitimacy. *Van Tuyl v. Van Tuyl*, 235

2. The fair construction of section 399 of the Code of Procedure is, that when adverse rights by succession are involved, one litigant shall not testify to a transaction with the deceased predecessor in title, invalidating or impairing the right or title of the other. *ib*

See EVIDENCE, 2, 4, 5.
OPINIONS OF WITNESSES.
PRACTICE, 15.

WRIT OF ERROR.

See CRIMINAL LAW, 11, 12.

END OF VOLUME FIFTY-SEVEN.

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